TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1915

No. [redacted] 118

FRANK NICOULIN, PLAINTIFF IN ERROR,

vs.

JOHN J. O'BRIEN.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JANUARY 6, 1916.

(24,726)

(25,735)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 905.

FRANK NICOULIN, PLAINTIFF IN ERROR,

vs.

JOHN J. O'BRIEN.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 8, 1917.

1 COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the 29th Day of November, 1916.

FRANK NICOULIN, Appellant,

vs.

JOHN J. O'BRIEN, Appellee.

Appeal from the Jefferson Circuit Court, Common Pleas Branch, #1.

Be it remembered, that heretofore, to-wit, on the 29th day of August, 1916, the appellant by his attorneys filed in the office of the Clerk of the Court of Appeals a transcript of the record, which is in words and figures following, to-wit:

2 STATE OF KENTUCKY,
County of Jefferson:

Pleas Before the Honorable William H. Field, Judge of the Jefferson Circuit Court, Common Pleas Branch, First Division, at the Court-house in the City of Louisville, County and State Aforesaid, and on the Dates Hereinafter Mentioned.

Transcript of Record.

FRANK NICOULIN, Plaintiff,

vs.

JOHN J. O'BRIEN, Defendant.

Be it remembered, that heretofore to-wit, on the 7th day of August, 1916 came plaintiff, by counsel and filed his petition herein.

Said petition is in words and figures as follows, to-wit:

3 Jefferson Circuit Court, Common Pleas Branch, — Division.

97300.

FRANK NICOULIN, Plaintiff,

vs.

JOHN J. O'BRIEN, Defendant.

Petition.

The plaintiff, Frank Nicoulin, states that the defendant John J. O'Brien, is and was at all the time herein mentioned, the duly elected, commissioned, qualified and acting Justice of the Peace for the Seventh Magisterial District of Jefferson County, Kentucky, and that said plaintiff is a fisherman earning his living by fishing in the Ohio River where it forms part of Jefferson County, Kentucky, by seining and otherwise.

Plaintiff further states that heretofore, to-wit: on the 4th day of August, 1916, said defendant in his official capacity had filed before his as such Justice of the Peace, the following affidavit, to-wit:

"This day personally appeared before me, a Justice of Peace, James Duddy, who being sworn, states that Frank Nicoulin did, on or about the 24th day of July, 1916, in the County of Jefferson, Commonwealth of Kentucky, to-wit: in the Ohio River, Southwardly and this side of low-water mark on the northwest, or Indiana side, of said river, unlawfully, willfully and maliciously, catch and take
4 fish from the waters of said river at said time and place in this Commonwealth, by means other than the use of poles and lines, hand lines, at said time and place in said Ohio river in this Commonwealth, catch and take said fish from said waters of this State by means of and with the use of a seine, said seine not being a minnow sein, and the said fish so caught and take- not being minnows to be used for bait for fishing with pole and line, hand line, set line or trot line.

JAMES DUDDY.

Subscribed and sworn to before me by James Duddy this 4th day of August, 1916.

——— ———.

Plaintiff further states that he is the Frank Nicoulin referred to in said affidavit.

Plaintiff further states that thereupon said John J. O'Brien in his said official capacity, issued the following warrant:

"Commonwealth of Kentucky" to the Sheriff or any constable of Jefferson County, Greetings:

It appears that there are reasonable grounds for believing that Frank Nicoulin has committed the offense of unlawfully, willfully

and maliciously catching and taking fish from the water mark on the northwest, or Indiana, side of said river, and in the County of Jefferson and Commonwealth of Kentucky, by means other than the use of poles and lines, hand lines, or trot lines, and of unlawfully willfully and maliciously, at said time and place, in said Ohio
5 River, in this Commonwealth and County, catching and taking said fish from said waters of this State by means of and with the use of a seine, said seine not being a minnow seine and said fish so caught and taken not being minnows to be used for bait for fishing with pole and line, hand line, set line, or trot line, you are therefore commanded forthwith to arrest said Frank Nicoulin and bring him before me, John J. O'Brien, J. P. J. C., 609 West Market Street, Louisville, Jefferson County, Ky., to be dealt with according to law.

Given under my hand this 4th day of August, 1916.

JOHN J. O'BRIEN,
Justice of the Peace, Jefferson County, Ky.

Plaintiff further states that he is the Frank Nicoulin referred to in said warrant.

Plaintiff further states that said warrant was placed in the hands of a peace officer of Jefferson County for service and was served on the plaintiff herein by said officer taking him in custody; that thereafter said plaintiff was pres-nted for trial on the 4th day of August, 1916 before that said defendant in his said official capacity and upon his arraignment before said defendant at said trial he first filed his demurrer to said warrant attacking both the jurisdiction of the said court to try the alleged offense set out in said warrant and also attacking the sufficiency of said warrant in setting out any offense; that thereupon said defendant in his said official capacity having
6 been duly advised, overruled said demurrer and that thereupon the said plaintiff pleaded not guilty and that thereupon trial under said warrant was entered into and it was agreed that the facts were that the said plaintiff had on or about the 24th day of July, 1916, been seining for fish in the Ohio River where the same is embraced in Jefferson County Kentucky, and at a point more than 100 yards from the low water mark of said Ohio River on the Indiana side, and that thereupon said defendant in his official capacity, being sufficiently advised, did adjudge said plaintiff herein guilty of the offense charged in said warrant and did enter a judgment against said plaintiff adjudging that the said plaintiff pay the sum of Fifteen Dollars and costs as a fine for the said alleged offense of seining for fish in the the Ohio river, and that thereupon the said defendant in his said official capacity threatened to and is still now threatening to issue a capias profine against this plaintiff herein to compel him either to pay said fine and costs or to be imprisoned in the county jail of Jefferson County, Kentucky, until the same shall have been satisfied according to the statutes in such cases made and provided.

Plaintiff further states that the defendant herein in adjudging plaintiff guilty of the alleged offense of seining for fish in the Ohio

river and entering a judgment for the fine as aforesaid, purported to do so by virtue of the alleged authority alleged to be given by virtue of Section 2 of Chapter 29 of the Acts of 1916 of Kentucky, which reads as follows:

7 "It shall be unlawful for any person or persons to catch or attempt to catch any fish in any of the waters of the State except in private ponds, by the use of a wing net, set net, seine, trap, trammel net, dip net or any other kind of a net or contrivances mentioned in this section, shall be guilty of a misdemeanor and upon conviction thereof before any court of competent jurisdiction, shall be fined not less than Fifteen Dollars nor more than One hundred dollars for each offense."

The plaintiff further states that when the State of Virginia gave its consent and as a condition to the creation of the then County of Kentucky into the present State of Kentucky it entered into a certain contract or compact with said proposed State of Kentucky, known as the Compact with Virginia.

Plaintiff further states that in and by the 7th Clause of said compact, it was provided and agreed upon between said State of Virginia, and the State of Kentucky, as follows, to-wit:

"That the use and navigation of the River Ohio so far as the territory of the proposed State or the territory which shall remain within the limits of this Commonwealth lines thereon, shall be free and common to the Citizens of the United States and the respective jurisdictions of the Commonwealth and of the proposed State on the river aforesaid shall be concurrent only with the States

8 which may possess the opposite shores of the said river."

Plaintiff further states that the "proposed State" and "the Commonwealth" referred to in said 7th Clause, are respectively Kentucky and Virginia, and that in and by said 7th Clause of said compact with Virginia, which is still in full force and effect, the jurisdiction on the River Ohio, in so far as said River Ohio composes any part of Jefferson County, Kentucky, and especially all that portion of the River Ohio where the alleged offense of seining in the Ohio River on the part of the plaintiff is alleged to have been committed, is and was at all the times herein mentioned concurrent on the part of the State of Kentucky and the State of Indiana.

Plaintiff further states that the State of Kentucky and the State of Indiana, through the highest courts of each of said States, have construed the concurrent jurisdiction referred to in said 7th Clause of said Virginia Compact, to cover not only civil and criminal jurisdiction to try cases, but also to cover the right and power on the part of each State to pass certain laws concerning the Ohio River where it serves as a boundary between the States of Kentucky and Indiana and that among such laws are the laws *of* regulate fishing..

Plaintiff further states that prior to the time the plaintiff is alleged to have committed the said alleged offense, the said State of Indiana, had, through its duly authorized legislative depart-

9 ment, enacted a law governing the subject of fishing in the streams over which Indiana had jurisdiction; said law which is and was at all the times herein mentioned, in full force and ef-

feet, being Section 2541 of Burns' Annotated Indiana Statutes 1908 edition, and is in words and figures as follows, to-wit:

"Whoever shall take, catch or kill or attempt to take, catch or kill any fish in any of the waters of this State by means of any gig, spear, seine, net or trap of any kind, except as otherwise provided in this section, or whoever shall kill or destroy or attempt to kill or destroy any fish by the use of Indiana Cockle fish berries or other substances which have a tendency to stupify or poison fish, shall on conviction be fined not less than Ten Dollars nor more than Twenty Dollars, to which may be added imprisonment in the County Jail for any period not to exceed thirty days and for a second or subsequent offense he shall be fined not less than Fifty Dollars nor more than Two Hundred dollars, to which may be added imprisonment in the County jail for any period not to exceed sixty days provided that the provisions of this section as to the use of gig, spear, seine, *not* or traps of any kind shall not apply to the waters of Lake Michigan private ponds, the Ohio River or the Wabash River, so far as it is the boundary line between the States of Indiana
10 and Illinois; but in such case it shall be nevertheless unlawful to use any net, seine or trap in the Ohio River or Wabash River so far as the same is the boundary line between the States of Indiana and Illinois within one hu*d*red yards of the mouth of the stream emptying into said rivers from the Indiana side; nor to persons catching minnows for bait with a minnow trap or minnow seine, which seine shall not be more than twelve feet long, four feet deep and the meshes of which shall not be larger than one-fourth of an inch."

Plaintiff further states that in and by the act of the Indiana Legislature above referred to, the State of Indiana has and is exercising jurisdiction over the Ohio rover with reference to the regulation of fishing therein in so far as said Ohio rover forms any portion of the boundary line of said State of Indiana.

Plaintiff further states that the act of the State of Kentucky under which the defendant herein purported to fine the said plaintiff as aforesaid, is and was unconstitutional in that the same is violative of the 7th Clause of the said compact between the States of Virginia and Kentucky and is therefore violative of the First Subsection of Section 10 of Article 1 of the Constitution of the United States forbidding any State to pass any law impairing the obligation of contracts, and the said act under which said defendant purported to fine this said plaintiff as aforesaid is further violative of the Fourteenth Amendment of the Constitution of
11 the United States in that it is an attempt to make or enforce a law which abridges the privileges or immunities of the citizens of the United States and deprive this plaintiff of life, liberty and property without due process of law and denies to him the equal protection of the law and is therefore unconstitutional.

The plaintiff further states that said act, being unconstitutional, there was no other authority, legislative or otherwise, authorizing or empowering the said defendant to try said plaintiff for the said alleged offense or to fine him for the same and that the said acts of

seining in the Ohio River at the time they were committed and were not offenses against the peace and dignity of the Commonwealth of Kentucky, or of the State of Indiana, either by way of misdemeanor or felony and that by reason of the premises hereinbefore stated, the said defendant, in his said official capacity was without jurisdiction to try the said plaintiff of said alleged offense, was without jurisdiction to enter judgment fining the said plaintiff as aforesaid, and is without jurisdiction to issue a capias pro fine he is threatening to issue as hereinbefore stated.

Plaintiff further states that he has no remedy by way of appeal from the said purported judgment of said defendant and that unless the writ of prohibition herein requested be granted him, he will suffer great and irreparable injury for which he has no adequate remedy at law. Plaintiff further states that the writ of prohibition herein requested has never been granted or refused by any Court *of* any Judge.

12 Wherefore, plaintiff prays that this Court issue a writ of prohibition against the defendant herein forbidding him from issuing a capias pro fine hereinbefore referred to or from taking any further steps of whatever nature or description to enforce in any way whatsoever the purported judgment herein referred to for his costs expended and for all proper relief.

E. A. LARKIN,
RICHARD P. DIETZMAN,
Attorneys for Plaintiff.

Filed Aug. 7th, 1916.

At a Court held on the 7th day of August, 1916.

97300.

FRANK NICOULIN

vs.

JOHN J. O'BRIEN, etc.

Came the parties by counsel, and came the plaintiff by counsel and moved the Court on a written motion filed for a writ of prohibition against the defendant John J. O'Brien as Justice of the Peace of the Seventh Magisterial District of Jefferson County, Kentucky, forbidding and prohibiting him from enforcing and attempting to enforce in any way *any* whatsoever by execution, capias profine, or otherwise a purported judgment entered against the plaintiff herein August 4th, 1916, by said defendant adjudging the plaintiff guilty of the alleged offense of seining for fish in the Ohio River and fining him the sum of Ffteen dollars and costs to which the defendant objects.

13 Came the defendan[illegible]y counsel and filed a general demurrer to the petition herein.

Came the defendant by counsel and filed a special demurrer to the petition herein.

Arguments of counsel having been heard upon said motion and demurrers and the court not being advised it is ordered that said motion and demurrers be and are submitted.

Motion.

Motion in Court on the 7th day of August, 1916, is in words and figures as follows to-wit:

Jefferson Circuit Court, Common Pleas Branch, First Division.

No. 97300.

FRANK NICOULIN, Plaintiff,

vs.

JOHN J. O'BRIEN, Defendant.

Motion.

Comes the plaintiff in the above styled action and moves the court for a writ of prohibition against the defendant John J. O'Brien as Justice of the Peace of the Seventh Magisterial District of Jefferson County, Kentucky, forbidding and prohibiting him from enforcing or attempting to enforce in any way whatsoever, by execution, capias pro fine, or otherwise, a purported judgment entered against the plaintiff herein on August 4th, 1916, by said defendant
14 adjudging the plaintiff herein guilty of the alleged offense of seining for fish in the Ohio River and fining him the sum of Fifteen Dollars and costs.

E. A. LARKIN,
RICHARD PRIEST DIETZMAN,
Attorneys for Plaintiff.

General and Special Demurrers.

General and Special Demurrers filed in Court Aug. 7th, 1916, *is* as follows:—

Jefferson Circuit Court, Common Pleas Branch, First Division.

97300.

FRANK NICOULIN, Plaintiff,

vs.

JOHN J. O'BRIEN, Defendant.

General Demurrer.

The defendant John J. O'Brien demurs to the plaintiff's petition herein because it does not state facts sufficient to constitute or support a cause of action against him.

JOHN J. SULLIVAN,
Asst. County Atty., and
JOSEPH G. SACHS, JR.,
Attys. for Deft., John J. O'Brien.

15 *Special Demurrer.*

The defendant John J. O'Brien demurs Specially to the plaintiff's petition herein because said plaintiff has no legal capacity to sue herein.

JOHN J. SULLIVAN,
Asst. County Atty., and
JOSEPH G. SACHS, JR.,
Attys. for Deft., John J. O'Brien.

Order & Judgt.

At a Court held on the 25th day of August, 1916.

97300.

FRANK NICOULIN

vs.

JOHN J. O'BRIEN.

Order & Judgment.

This action coming on to be heard and having been duly submitted on the motion of the plaintiff for a writ of prohibition against the defendant and on the special and general demurrers of the defendant to the petition of the plaintiff filed herein and the court having been sufficiently advised on the pleadings herein, now files a written opinion, which is hereby made part of the record, and in accordance therewith it is hereby considered, ordered and adjudged that the special demurrer of the defendant to the plaintiff's

petition herein be and the same is hereby overruled, to which said defendant objects and excepts.

16 It is further considered, ordered and adjudged that the general demurrer of the defendant to the plaintiff's petition herein be and the same is hereby sustained, to which the plaintiff herein objects and excepts.

Thereupon, the plaintiff declining to plead further, it is considered, ordered and adjudged that the motion of the plaintiff herein for a writ of prohibition against the defendant, be and the same is hereby overruled, to which the said plaintiff objects and excepts, and it is further considered, ordered and adjudged that the petition of the plaintiff herein, be and the same is hereby dismissed and that the defendant recover of the plaintiff his costs herein expended, for which he may have execution. To all of which the plaintiff objects and excepts and prays an appeal to the Court of Appeals, which is hereby granted.

Opinion.

Said opinion filed on the 25th day of August, 1916, is as follows:

Jefferson Circuit Court, Common Pleas Branch, First Division.

No. 97300.

FRANK NICOULIN, Plaintiff,

vs.

JOHN J. O'BRIEN, Justice of the Peace, Defendant.

Opinion.

An act of the General Assembly of Kentucky, approved March 22, 1916, and by the express letter of its title no less than by its manifest spirit designed for the protection of fish, prohibits

17 by its section the taking of fish from any water in Kentucky, other than private ponds, except by "poles and lines, hand lines, set lines, or trot lines" and by its second section makes unlawful the use of a seine, violation of either section being a misdemeanor punishable by fine.

Acts of 1916, Chap. 29.

Frank Nicoulin, "a fisherman making his living by fishing in the Ohio River by seining and otherwise," was on August 4, 1916, in a warrant issued by Justice O'Brien, who, assuming the constitutionality of the act, had under its ninth section jurisdiction—charged with having taken fish by means of a seine from the Ohio River "southwardly and this side of the low water mark on the northwest, or Indiana, side of said river, and in Jefferson County, Kentucky." Proper steps having been taken to challenge the validity of the act, the facts charged were confessed by Nicoulin and the Justice, declar-

ing him guilty, assessed the minimum fine of $15. This action was then filed in the Circuit Court, the plaintiff seeking a writ prohibiting further proceedings. It is claimed that the act upon which the prosecution was based *in* unconstitutional, because violative of a provision of what is familiarly called the Compact with Virginia, a part of the fundamental law of Kentucky. The Ohio River marks in a general way the northern line of Kentucky and the southern limit of Indiana; the provision alleged to be violated on the water that is
18 their mutual boundary. It is said that, both States having jurisdiction on the river, neither can legislate with reference thereto without concurrence and substantially similar action by the other—in a word, that the Ohio River is a domain to be controlled jointly by the two States, subject of course to the conceded powers of the Federal government. The Kentucky law, not having been concurred in by Indiana, is therefore said to be without foundation of authority. The matter is submitted on the defendant's demurrers, special and general, to the petition and the plaintiff's motion for a writ of prohibition.

1. In support of the special demurrer to the petition, it is urged the plaintiff—said, in the brief in behalf of the defendant though not mentioned in the record, to be a citizen of Kentucky—will not be heard to object that the Kentucky law is invalid because violative of Indiana's right. It is, it is said, for Indiana to object. The plaintiff "is not in a condition," it is urged in the language of an opinion of the Supreme Court of the United States, "to question the relative rights of his superiors." Counsel for the defendant cites on this point:

Bundle, &c., v. Delaware & Raritan Canal Co., 14 How., 80.
Keator Lumber Co. v. St. Croix Boom Corporation, 72 Wis., 97; 7 Am. St. R., 837.

19 It seems sufficient to say that neither of these cases is applicable. The plaintiff, charged with the violation of a Kentucky law, protests that Kentucky had no power to enact it, that only Kentucky and Indiana, acting concurrently, could so legislate, and that he is prosecuted under an invalid act. If his premise is correct, his conclusion is sound: surely he has the right to be heard on his objection.

11. The general demurrer draws in question the constitutionality of the act of 1916 as applied to the Ohio River between Kentucky and Indiana, the practical inquiry being as to the right of Kentucky, in view of the Compact with Virginia, to regulate, without approbation of her neighbor, fishing in that river. If she has not that right, that act is a nullity, and the prosecution of the plaintiff is without basis and the Justice without jurisdiction.

Pennington v. Woolfolk, 79 Ky., 13.

The Compact with Virginia is nothing more or less than the final of a series of acts of the General Assembly of Virginia within a few years after the colonial assertion of independence and the birth of the sovereign commonwealth, all of these acts resulting in the course of

the agitation by the people of Kentucky for independent government. It detailed the various conditions upon which Virginia would agree to Kentucky's separation from her; accepted by the
20 Kentuckians and approved by the Federal government, Kentucky became a State. It is to be remembered throughout the discussion that the Compact was a contract between Virginia and the people of Kentucky: they alone were the parties to it. Of the seventh condition—the one in controversy here—the States of Ohio, Indiana, and Illinois became beneficiaries and as to these, while not parties, the contract may be said to have, to this extent, been made for their benefit. As in the case of any ordinary contract between individuals, the intention of the contracting parties must be sought—first, in the language employed by the parties themselves in memorializing their agreement, and, second, if their language is ambiguous, in any extraneous circumstances that may illustrate the purpose. It will be seen, when in due course the Compact comes under consideration, that the meaning cannot be ascertained from the language alone. Following the rule of construction, then, and referring to whatever circumstances may afford light, the Compact may be studied in its relation to Virginian history and in its connection with the general scheme for the development, division, and organization of the great transmontane empire. For its seventh clause was written, not as an isolated and local provision merely, touching only the relations of the contracting parties, but in contemplation and prophecy of mighty change. The decision in this case, while determi-
21 nate only of the validity of Kentucky's law, necessarily, as will be apparent, involves the rights not only of this State but of Ohio, Indiana, Illinois, and West Virginia as well regarding the regulation of the liberty of fishing in the Ohio.

Each of the three charters of James I., proprietor of Virginia by right of discovery, granted to the founder of and included in the Colony a certain coast line,

"and all that Space and Circuit of Land lying from the Sea Coast of the Precinct aforesaid up into the Land throughout from Sea to Sea West and Northwest."

Thorpe: 7 American Charters, Constitutions and Organic Laws, 3783, 3790, 3802.

Among the numerous things particularized according to the precise habit of law were, "soils, lands, grounds, havens, ports, rivers, waters, fishings, jurisdictions." By the last, and controlling, charter of 1611-2, the colony was given a coast line of four hundred miles, two hundred miles north and south from Point Comfort. The stream subsequently called the Ohio, traversing the granted territory in a generally westwardly course, and the soil beneath it belonged to the colony. The province was limited on the west only by the indefinite waters of a western sea; the practical limites were enlarged from season to season as the steady advance of the pioneers reduced the mountain valleys and the wilderness beyond to actual pos-
22 session. As political and governmental necessities demanded subdivision, new counties were one by one carved out of the

ever extending western areas of the old, the western boundaries never defined but always remaining as fixed in the original grant. So came into being, their respective seats each marking for a period the outpost of organized society, Spottsylvania—named for Governor Spotswood, the romantic "Knight of the Golden Horseshoe,"—Orange, Augusta, Frederick, Botetourt, and, finally Fincastle.

Henning's Statutes at Large: 4 Vol. 450; 5 Vol. 78; 8 Vol. 395, 600.

Fincastle County comprised the transmontane country south of the Ohio river. In 1776, the first years of the Commonwealth of Virginia, Fincastle County was abolished, its territory being framed into the counties of Kentucky, Washington and Montgomery.

Henning: 9 Statutes at Large, 257.

Littell: 1 Laws of Kentucky, 626.

In 1780 Kentucky County was dismantled and its territory subdivided into the counties of Jefferson, Lincoln and Fayette, the three comprising what was called the District of Kentucky. Two counties, Nelson and Madison, were erected in 1785.

Henning's Statutes at Large: 11 Vol. 469; 10 Vol. 315.

23 It is a temptation to go deeper into the stern history of a troubled era when an empire was in the making than the study of the question involved demands or judicial license warrants. Suffice it to say that, as a result of the insistent demands of the people of the Western lands and of the negotiations between their representatives and the authorities of Virginia, the General Assembly, in 1785, 1788 and 1789, enumerated the conditions upon which the citizens of the District of Kentucky might separate from the mother-State and establish a commonwealth of their own.

Henning's Statutes at Large: 12 vol. 37, 788; 13 Vol. 17.

The proposed separation of Kentucky from Virginia was not the only structural change impending. The dominion of Virginia under the grant *form* the king included as well the lands beyond the Ohio as those south. Possession of these Clark had but lately wrested from European hands and Andrew Lewis at Point Pleasant had begun the destruction of the Indian power which Wayne was to complete at Fallen Timbers. Pursuant to negotiations begun in 1781 with the government of the conf-derated States, Virginia had in 1784 ceded to it all of the great Northwestern Territory, with the agreement that it should be divided into three States, two more to be later erected as increase in population warranted.

Thorpe: 2 American Charters, Constitutions, and Organic Laws, 955.

24 8 Federal Statutes Annotated, 17.

11 Henning's Statutes at Large, 320.

The cession included all Virginian territory "situated, lying, and being to the northwest of the Ohio river" and east of the Mississippi.

When, independence declared—and subsequently established by the successful issue of the Revolutionary War,—Virginia blossomed from a dependent colony into a sovereign State, she took as her very own all that she had formerly held under conditions from the crown.

Russell v. Jersey Co., 15 How., 426.
Smith v. Maryland, 18 How., 74.
Illinois Central R. Co. v. Illinois, 146 U. S. 456.
People v. N. Y. & S. I. F. R. Co, 68 N. Y., 71.
Hume v. Rogue River Packing Co., (51 Ore. 237; 131 Am. St. R., 732.)

Virginia, owning the lands on both sides of the Ohio, had, as said in McFarland et al. v. McKnight, 6 B. M., 500,

> "According to the principles of the law of nations, the dominion, empire, sovereignty, and jurisdiction over that part of the Ohio River flowing through her territory."

The cession, then, of her domain, "northwest of the Ohio River," being very clearly exclusive of that water, left her proprietorship unaffected. Indeed, a practical rule of construction for ascertaining the intent under such circumstances has been evolved. Where a river separates two States, if one of them was the original proprietor of the lands on both sides and ceded the land on the opposite side, the grant running from the river, then the original proprietor is deemed to have retained the stream, unless a contrary intent clearly appears. But where neither State was the original proprietor, then the territory of each runs to the middle line of the main channel, in the absence of a contrary agreement.

Handley v. Anthony, 5 Wheat., 374.
Howard v. Ingersoll, 13 How., 381.
Fleming v. Kenney, 4 J. J. M., 155.

It has been settled for a century, therefore, that, after the cession of the Northwest Territory, Virginia remained the proprietor of the Ohio River and its bed to low-water mark on the northern sice and that Kentucky succeeded to this proprietorship from her eastern line westward to the Mississippi.

Handley v. Anthony, 5 Wheat., 374.
Indiana v. Kentucky, 136 U. S., 1.
Fleming v. Kenney, 4 J. J. M., 155.
Church v. Chambers, 3 Dana., 279.
McFarland v. McKnight, 6 B. M., 500.
McFall v. Com., 2 Met., 394.
Louisville Bridge Co. v. Louisville, 81 Ky., 189.

The proprietorship of Kentucky and the attendant jurisdiction are subject to any limitations that may have been laid thereon in that contract between Virginia and Kentucky which gave the foundation for the independence of the latter. In each

of the several acts of the General Assembly of Virginia touching the matter, the seventh condition is stated as follows:

"The use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory which shall remain within the limits of this Commonwealth, lies thereon shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed State on the river aforesaid shall be concurrent only with the States which may possess the opposite shores of the said river."

Henning's Statutes at Large; 12 vol., 37, 240, 788; 13 vol. 17. Kentucky Statutes (1915) 29.

The Compact meeting no challenge by the Federal government Kentucky was duly admitted into the Union by act of the first Congress in 1791. The agreement with Virginia was specifically made parts of the three older Constitutions of Kentucky:

Constitution of 1792, Art. VIII., Sec. 7.
Constitution of 1799, Art. VII., Sec. 9.
Constitution of 1850, Art. VIII., Sec. 9.

It [illegible] in terms included in the existing Constitution. If its [illegible] letter [illegible] of vital importance, it might be plausibly argued that this is done by a provision that appears also in the earlier instruments:

"All laws which, on June 1, 1792, were in force in the State of Virginia, and which were of a general nature and not local to that State, and not repugnant to this Constitution, nor to the laws which have been enacted by the General Assembly of this Commonwealth, shall be in force within this State until they shall be altered or repealed by the General Assembly."

Constitution, 223.

But as a practical matter, it is immaterial. It is a contract, the terms of which, self-executing, are invulnerable to repugnant legislation and, existing of their own force, need no legislative aid.

We may draw from this review of the situation the following pertinent facts: (1) Virginia, proprietor of the areas on both sides of the Ohio, ceded to the Confederation the lands northwest of the river, retaining proprietorship of the river and soil beneath to the low-water mark; (2) Indiana, erected out of part of the ceded country, runs from the law-water mark and had and has no proprietorship in the river; (3) Kentucky, carved out of the domain retained by Virginia, succeeded to her rights and is the proprietor of
28 the river and of the soil beneath to the low-water mark on the Indiana shore. These facts existed at the time the General Assembly of Virginia wrote the conditions upon which Kentucky subsequently acquired [illegible] Virginian empire south of the Ohio. The provisions of the seventh condition, while immediately referable to the particular matter in negotiation—the separation of Kentucky—were written, nevertheless, as a part of and with an eye to the larger plan for the ultimate independence of the whole western area. With these controlling facts, which formed the historical setting for the Compact, understood, we come to the ultimate question arising

in the present controversy from the conference of concurrent jurisdiction of the river.

In Arnold et al. v. Sheilds et al., 5 Dana, 18, Chief Justice Robertson, expressly declining to say whether the Kentucky Statute challenged in that case violated the Compact, because the opinion upon that constitutional question was not necessary to the decision of the particular controversy, used the following significant langauge:

"Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judiciary, and executive—as that possessed by Kentucky over so much of the Ohio river as flows between them; and, consequently, neither of them can, consistently with the Compact, exercise any authority over their common river so as to destroy, or impair, or obstruct the concurrent rights of the other."

If this be an extra-judicial statement, yet it is entitled— The
29 statement that the jurisdiction concurrent in Kentucky and Indiana includes the regulation of fishery, not being necessary to the decision, cannot be given controlling weight.

There are a number of cases defining generally, or defining in connection with the particular facts, the term concurrent jurisdiction as applied to the boundary waters of adjoining States.

Roberts v. Follerton, 117 Wis., 222; 65 L. R. A., 653.
Ex Parte Despeiro, 152 Fed., 1004.
In Re Mattson, 69 Fed., 535.
President v. Trenton City Bridge Co., 13 N. J. Eq., 46.
Keator Lumber Co. v. St. Croix Boom Corporation, 39 N. W., 529.
Wedding v. Meyler, 192 U. S., 573.
Nielson v. Oregon, 212 U. A. 315.

The general philosophy of these decisions and the distinct holding of some *in* that where two States, each owning to the middle of their boundary river, have concurrent jurisdiction on that water, neither can alone regulate fishing therein but they must act in concord to produce valid legislation.

30 But the peculiar character of the Ohio River lying in the fact that it was originally under the sole dominion of Virginia, very clearly differentiates it from various other notable and historic waters, the Columbia, the Mississippi, the Missouri, and the Hudson—whose middle lines determine the territories of the respective States occupying their opposite shores.

Nielson v. Oregon, 21 U. S., 315.
Missouri v. Kentucky, 11 Wall., 395.
St. Joseph &c. R. Co. v. Devereaux, 41 Fed., 15.
Ex Parte Devore Mfg. Co., 108 U. S., 401.

The definitions of concurrent jurisdiction based upon circumstances varying so materially from those surrounding the Ohio River will, therefore, be laid to one side, and the phrase will be considered in the light of the circumstances existing and of the

territorial and governmental changes in contemplation at the time it was written in the Compact.

Running fish are classed in law as feræ naturæ. At common law the king was proprietor of the fish in public waters, as he was of those waters; he might grant an exclusive franchise; in the absence of such grant, the liberty of fishery was common.

2 Blackstone, 417.
State v. Thierhault, 70 Vt. 617; 43 L. R. A., 290; 67 Am. St. R., 695.

In the grants from King James to the Colony of Virginia "rivers" and "fishings" were, as already noted particularly included.

31 7 Thorpe, 3783, 3790, 3802.

The Colony, then, holding from the king the rivers, also held the fish therein; the States absorbed not only the rights of the Colony out of which it flowered but, freed of royal control, those of the king as well. Virginia's relation to her rivers and her running fish may be stated in the terms of two opinions of the Supreme Court of the United States.

"Whatever soil below low water mark is the subject of exclusive propriety and ownership belongs to the State on whose maritime borders, and within whose territory, it lies * * *

But this soil is held by the State not only subject to, but in some cases in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish."

(Smith v. Maryland, 18 How., 71.)

"The States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its People, and the ownership is that of the People in their united sovereignty."

(McCready v. Virginia, 94 U. S., 391.)
Pollard v. Hagan 3 How., 212.
Munford v. Waddell, 6 Wall., 436.
Weber v. Commissioners, 18 Wall., 66.
Hardin v. Jordan, 140 U. S., 382.
Illinois Cent. R. Co. v. Illinois, 142 U. S., 456.
Shivley v. Bowley, 152 U. S., 24.
Lawton v. Steele, 152 U. S., 130.
Miles v. Cedar Point Club, 175 U. S., 300.
Manchester v. Massachusetts, 139 U. S., 240.
Willow River Club v. Wade, 100 Wis., 94; 42 L. R. A., 305.
32 State v. Mallory, 56 Ark., 270; 67 L. R. A., 782.
Ex Parte Bailey, 155 Cal., 672; 132 Am. St. R., 95.
Hume v. Rogue River Packing Co., 51 Ore., 237; 131 Am. St. R. 732.
State v. Lewis, 134 Ind., 250; 20 L. R. A. 52.
Ex Parte Fritz, 86 Miss., 210; 109 Am. St. R., 700.
People v. Bridges, 142 Ill., 30; 16 L. R. A., 684.
McCready v. Virginia, 94 U. S., 391.

The State was, then, the proprietor, in trust for its people, of the fish in its waters, including the Ohio River. Her citizens had the common right to take them; having taken them, they become the individual property of the captors.

Fuller v. Fuller, 84 Me., 475.

Parker v. People, 111 Ill., 581; 53 Am. Rep., 643.

When in 1784 Virginia ceded to the confederation the empire "northwest of the Ohio River," retaining territorial right to the river and the soil beneath, she also retained a dominion of the fish in the stream consonant with their migratory character and subject to the common liberty in the public to take them. Consideration of the history of Virginia, of her legal position with reference to the Ohio and its fish, of the legal documents relating to her cession of the Northwest Territory and the separation of Kentucky, and of her negotiations with Maryland, suggests several cogent reasons for the belief that when her legislators wrote and the people of Kentucky accepted that Compact enumerating the conditions upon which the latter might become independent, it was not the intention,
33 whatever the comprehension of the concurrent jurisdiction specified, to include in it the regulation of the liberty of fishing in the Ohio.

(1) In the Compact, the concurrent jurisdiction was limited by the phrase "on the river." The use of the word "on" might be of no especial significance were it not for the historical conditions that have been noted. While Chief Justice Robertson translated the word "on" as "over," in the extra-judicial expression to which reference has been made, Mr. Justice Holmes emphasizes the word as it was written.

Church v. Chambers, 3 Dana, 274.

Wedding v. Meyler, 192 U. S., 583.

It seems sufficient to say that, considering all the circumstances, including those to which attention will be directed, concurrent jurisdiction "on the river" was not intended to include control of fishery.

(2) Virginia had in 1784 ceded to the Confederation the territory northwest of the Ohio, with the understanding that three sovereignties binding on the river should be created. The Northwestern Territorial Government was organized in 1787; the country was divided between the territories of Illinois and Indiana
34 in 1800; Ohio was separated and organized as a State in 1802; Indiana reached statehood in 1816, Illinois in 1818.

Thorpe: 2 vol. 957, 964, 970, 1053; 5 vol. 2897. In 1789, when the Compact was closed, the country northwest of the Ohio was under one government, but three independent governments were in contemplation. In the separation, Kentucky succeeded to Virginia's proprietorship of the Ohio and its running fish. To construe the Compact as securing to the contemp-ated States a jurisdiction concurrent with that of Kentucky to regulate fishing would be to say

that it was deliberately intended that Kentucky's policy as to her fish in the several hundred miles of *ther* river should be at the mercy of the three proposed sovereignties. Kentucky's regulations might not be concurred in by any of the other States: in such event there might be either no law at all or law inadequate or inconsistent, giving rise to irritating inconveniences. Each of the three States might have distinct policies: Kentucky to secure any regulation, might have to concur in these: in that event, fishing for Kentucky's fish in Kentucky's river might be regulated, according to locality, by three distinct sets of laws, more or less at variance.

35 It is argued that should the construction urged in behalf of the plaintiff prevail and Kentucky be compelled to enact or concur in varying laws acceptable to Indiana, Ohio, and Illinois and applicable to such distinct stretches of the river as marks the boundary between Kentucky and these States, respectively, the legislation would be open to challenge as special.

Constitution, Sec. 59, sub. 23.

The obvious answer to this is that the Compact is a contract between Virginia and the people of the District of Kentucky by which the latter acquired the right to create a State and frame a Constitution and law of Kentucky, of whatever dignity, whether constitutional or legislative, can ignore or repudiate its provisions. It can be modified or annulled only by the power that made it.

Georgetown v. Alexandria Canal Co., 12 Pet., 91.
Green v. Biddle, 8 Wheat., 1.

If, then, special legislation is demanded of Kentucky by the Compact, the inhibition of the Constitution is without avail.

It may be noted in this connection that the fishery regulations of the State of Ohio apply to all "waters over which the State has jurisdiction."

Page & Adams: 1 Annotated Ohio General Code, (1912) sec. 1425 et. seq.

36 Illinois declares the ownership of all fish "in any waters within the jurisdiction of this State" to be in the State.
Jones & Addington: 3 Illinois Statutes Annotated, (1913) chap. 56.

In neither *od* these codes is the Ohio River mentioned: whether either State claims that this stream is within its jurisdiction to regulate fishing must depend upon its construction of *rhe* concurrent jurisdiction contemplated by the Compact. Indiana's regulations apply to all the "waters of the State" with the express exemption of the Ohio, except that seining therein is prohibited within one hundred yards of the mouth of any Indiana stream.

Burn's Annotated Indiana Statutes, (1908) 2541. Kentucky's

first general regulation of 1876 applied to all waters of the State, exempting, however, from the prohibition of the use of *net* the Ohio except within a half a mile of the mouth of any tributary stream. Amended variously in 1878, 1882, 1886, this law prevailed until 1893, then the new Constitution of 1891, with its denunciation of special laws, required general legislation.

General Statutes, (1887) pages 652-655.

Kentucky Statutes, (1903) chap. 53.

The act of 1916, herein challenged in its application to the Ohio river, supersedeas that of 1893. Virginia having permitted a number of her counties, including those on the Ohio, to frame a Con-
37 stitution, West Virginia became a State in 1862. In her first Constitution of 1861-3, this declaration appears:

"The State of West Virginia shall also include so much of the beds, banks, and shores of the Ohio River as heretofore appertained to the State of Virginia, and the territorial rights and property, and the jurisdiction of whatever nature over, the said bed, banks, and shores, heretofore reserved by or vested in, the State of Virginia shall vest in and be hereafter exercised by the State of West Virginia."

Thorpe: 7 vol., 4014.

West Virginia's elaborate game laws manifest a distinct claim to the right to regulate on the Ohio.

Hogg: 2 West Virginia Code Annotated, chap. 62.

If the intention credited to the Compact by the plaintiff is justified, the Ohio might be controlled as follows: (*a*) that part flowing between Kentucky and Illinois by law acceptable to those States; (*b*) that part between Kentucky and Indiana by laws agreeable to them; (*c*) that part between Kentucky and Ohio by another set of rules; and (*d*) that portion between West Virginia and Ohio by still another laws. These various sets of laws might differ widely and inevitably resulting confusion and inconvenience. Such a condition, a condition known, experienced, and guarded against by Virginia and Maryland, would not have intentionally been made possible.
38 All conflict might, of course, be obviated by a convention of the States interested, but that does not touch the question of intention.

(3) After ceding the Northwest Territory in 1784, Virginia held proprietorship of the Ohio and its fish. After Kentucky's separation from her, she held the upper reaches of the river, east of the Kentucky line, upon the opposite shore of which la*ie* a portion of the ceded territory which was in 1802 included in the State of Ohio. Virginia held all this line of the river until she permitted the independence of West Virginia in 1862, when the new State succeeded, as had Kentucky, to all the local territorial rights of the old.

Thorpe: 7 vol. 4011 et seq.

In 1789 it was written in that Compact, a result of which was to leave in Virginia's ownership the eastern river, that

"the respective jurisdictions of this Commonwealth (Virginia) and of the proposed State (Kentucky) on the river as aforesaid, shall be concurrent only with the States which may possess the opposite shores of said river."

It cannot with any degree of plausibility be said that Virginia by this language intended—or that Kentucky accepted such intention—to release her indisputable right to control her own river flowing over her own soil. Her ownership of the river, her proprietorship of the fish in trust for her people, carried obligations. To quote again from Smith v. Maryland, 18 How., 71:

"The State holds the propriety of this soil for the conservation of the public rights of fishery thereon and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery * * * This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held."

Vattel: Law of Nations, bk. 1., ch. 20 sec. 246. In the prosecution of her duty to her citizens as to the preservation of fish, Virginia might even have prohibited fishing in the Ohio by others than her own citizens. The right to fish is not a privilege or an immunity guaranteed by the Federal Constitution. Running fish belong to the people of the State in which the water lies and that State may preserve them exclusively for its own.

McCready v. Virginia, 94 U. S., 391.
State v. Harrub, 95 Ala., 1. 2; 15 L. R. A., 762.
Garfield v. Coryell, 4 Wash. (U. S.) 371.
Dize v. Lloyd, 36 Fed., 651.
Harvey v. Compton, 36 N. J. L., 507.
Chambers v. Church, 15 R. I., 398.

Prior to June, 1784, serious inconveniences had been experienced by the citizens of Virginia and Maryland, the two States binding for over a hundred miles on the Potomac River; these arose from the want of established rules regulating navigation and fishing rights. Territorially, the river belonged to Maryland through the grant to Lord Baltimore. In 1784, as the result of Virginia's initiative, an agreement was adopted establishing regulations efficient to prevent trouble in the future. Prior, then, to 1784, Virginia knew by experience of the conflicts that might be anticipated between the citizens of two sovereig*h*ties occupying opposite sides of a stream.

Henning, 12 Statutes at Large, 50.
Wharton v. Wise, 153 U. S., 155.

With this knowledge, the movement which had been inaugurated in 1781 looking to the cession of the Northwest Territory was carried in fruition in 1784; not a word was said in the formal instru

ment of transfer concerning rights on the river vesting in the Confederation or to vest in the States to be erected.

Virginia Act of Cession (1783); Deed of Cession from Virginia (1784);
Thorpe, 2 vol., 955, 957.

With this knowledge, the agitation formally begun in December, 17-4, resulted in the separation of Kentucky in 1789: the only word said in the formal instruments authorizing and manifesting that separation with reference to jurisdiction on the river is that found in the seventh condition of the Compact. It has been shown that the Ohio River belonged to Virginia: it has been shown that the running fish therein belonged to her in trust for her
41 people: it has been shown that this trust imposed upon her a duty to preserve those fish for the benefit of her people. To construe the concurrent jurisdiction mentioned in the Compact as a conference upon the States beyond the Ohio of the right to regulate, or to participate in the regulation of, the liberty of fishery would demand the acceptance of three propositions:

First, that the absolute silence on the subject of Virginia's Act of Cession of 1783 and of her formal Deed of Cession of 1784 is to be utterly ignored;

Second, that notwithstanding this silence, particularly that of the direct instrument of transfer—a formal contract between the parties in interest—Virginia intended by the Compact—a contract between herself and Kentucky containing a stipulation of which the Northwestern States were beneficiaries—to be a grant to the latter;

Third, notwithstanding the silence of the more or less contemporaneous direct instrument of transfer, Virginia intended by the language of the Compact to surrender her exclusive sovereig*h*ty over her own proper domain, to share with other distinct governments the legislative control of her river under a condition that might make any control impossible, and to grant away to other peoples her own people's indisputable ownership of the fish, evading her
42 own duty of necessary regulation and conservation.

The construction of the Compact, at once a legislative act of Virginia and a contract between Virginia and Kentucky advocated in behalf of the plaintiff necessarily regards an obscure and ambiguous phrase as a grant. Had this been the intention, it would assuredly have been written into Virginia's Act of Cession and her Deed of Cession, the cession of the Northwest Territory and the separation of Kentucky having been in contemplation at the same time. It cannot, therefore, be taken as a grant. Ever, however, accepting it, with its vague conference of an undefined jurisdiction, as such, there is a salutary rule that no act of delegating sovereign power, derogating fro mthe sovr-ign authority, alienating sovereign property, or diminishing the sovereign ability to promote the general welfare and protect the interests of the people, will be assumed to include more than is explicitly defined or to mean more than is unequivo-

cally *explicitly defined or to mean more than is unequivocally* expressed.

Kentucky Cent. R. Co. v. Bourbon Co., 82 Ky., 497.
Charles River Bridge v. Warren Bridge, 11 Pet., 420.
Chenaugo Bridge v. Binghampton Bridge Co., 3 Wall., 51.
Wisconsin Cent. R. Co. *R. Co.* v. United States, 164 U. S., 190.
Hannibal & St. Joseph R. Co. v. Missouri River Packet Co., 125 U. S., 200.

43 Slidell v. Grandjean, 111 U. S., 412.
Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287.
Newton v. Mahoning Co., 160 U. S., 548.
Blair v. Chicago, 201 U. S., 400.
Jackson L. & S. R. Co. v. Davison, 65 Mich., 416.
Com. v. Erie &c., R. Co., 27 Pa. St., 339.
Gaines v. Coates, 51 Miss., 335.
Townsend v. Brown, 24 N. J. L., 80.
Harvey Coal & Coke Co. v. Dillon, 59 W. Va., 605, 6 L. R. A. (N. S.) 732.

The conclusion seems inevitable that, whatever be the meaning of the contested clause in the Compact, it not only did not grant but was not intended to grant the right to regulate or to participate in the regulation of the right of fishery in the Ohio river. While the question lies beyond the limits of this controversy, it is not improper to say what is obvious—that the line of reasoning followed in this discussion necessarily leads to the conclusion that Indiana, Illinois, and Ohio have no legislative jurisdiction on the river, but that such authority rests in Kentucky and West Virginia, the lineal successors to the sovereignty of Virginia. The Compact made free the "use" of the river to all citizens of the United States, thus enlarging the liberty of fishing which might have been restricted. But this extension of privilege was one thing, the surrender of sovereign authority another.

The conclusion being that Kentucky has the exclusive, un-
44 trammeled authority to regulate fishing on the Ohio, within her territorial limits, the application of the Act of 1916, to that river must be justified, and the act so applied held constitutional. The special demurrer to the petition is overruled; the general demurrer to the petition is sustained; and the plaintiff's motion for a writ of prohibition is overruled.

WM. H. FIELD, *Judge.*

STATE OF KENTUCKY,
County of Jefferson:

I, Frank Dugan, Clerk of the Jefferson Circuit Court, do hereby certify that the foregoing 43 pages contain a full, true and complete transcript of the record and proceedings in the action where Frank Nicoulin is plaintiff and John J. O'Brien, Justice of the Peace,

is defendant, #97300, an action lately pending in the Jefferson Circuit Court, Common Pleas Branch, First Division, as the same appears of record and now on file in my said office.

Witness, Frank Dugan, Clerk of said Court this 28th day of August, 1916.

FRANK DUGAN,
Clerk Jefferson Circuit Court.

45 *Order Sub.*

Be it remembered that on the 26th day of September, 1916, the following order was entered herein:

FRANK NICOULIN, Appellant,

vs.

JOHN J. O'BRIEN, Appellee.

Ordered that the above case be and same is hereby submitted.

Judgt.

And then on the 29th day of November, 1916, the following judgment was entered herein:

FRANK NICOULIN, Appellant,

vs.

JOHN J. O'BRIEN, Appellee.

Appeal from Jefferson C. P. #1.

The court being sufficiently advised it seems to it that there is no error in the judgment herein.

It is therefore considered that the judgment of the lower court be affirmed. Which is ordered certified to said court.

It is further adjudged that the appellee recover of the appellant its costs herein expended.

46 At the same time, November 29th, 1916, the Court delivered an Opinion herein in words and figures as follows, to-wit:

47 Court of Appeals of Kentucky.

November 29, 1916.

FRANK NICOULIN, Appellant,

v.

JOHN J. O'BRIEN, Appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the Court.

By Chief Justice MILLER, Affirming:

This case presents the interesting question as to what is the precise nature and extent of that concurrent jurisdiction granted to Kentucky and Indiana over the Ohio river, by the compact with Virginia. The facts from which the present controversy arose are as follows:

On August 4th, 1915, the plaintiff Frank Nicoulin, was arrested and tried before the appellee John J. O'Brien, a justice of the peace for Jefferson county, who was the defendant below, on the charge of seining for fish in the Ohio river, where it forms a part of the boundary line between Jefferson county, in Kentucky, and the State
48 of Indiana, and at a point on the Ohio river more than one hundred yards from the low-water mark of the Ohio river on the Indiana side.

The warrant was issued pursuant to sub-section 2 of Chapter 29 of the Acts of 1916, making it unlawful for any person to fish in any of the waters of the State, except in private ponds, by the use of a seine or any contrivance, other than is permitted by the act. Acts 1916, p. 340.

Upon the trial Nicoulin was found guilty and fined $15.00, and the costs of the prosecution. No appeal lying from that judgment by reason of the amount of the fine (it being less than $20.00), Nicoulin brought this action in the Jefferson circuit court to prohibit O'Brien from enforcing the judgment, upon the ground that the Act of 1916, supra, was invalid and ineffectual, and that O'Brien was, for that reason, without jurisdiction to enter the judgment imposing the fine.

There is no dispute about the facts; Nicoulin admits that he was seining in the Ohio river at a point which was more than a hundred yards this side of the low-water mark on the Indiana shore. He contends, however, that the Act of 1916, supra, is ineffectual because Kentucky and Indiana, having concurrent jurisdiction on the Ohio river at the point where he was fishing, the Act of 1916 had
49 never been concurred in by the State of Indiana. In other words, Nicoulin's contention is that "concurrent jurisdiction"

means "joint jurisdiction"; and, that when applied to the jurisdiction of Kentucky to enact penal laws applicable to the Ohio river, the phrase "concurrent jurisdiction" can only mean the power to enact such criminal statutes as are formally agreed to or acquiesced in by the State of Indiana, or such as were in force within its jurisdiction at the time the Kentucky statute was passed.

The circuit court, however, took a different view of the law of the case and denied the writ of prohibition. From that judgment Nicoulin prosecutes this appeal.

By a statute of Indiana it is declared that whoever shall catch fish in any of the waters of that State by means of a seine, shall be fined and imprisoned; but, this statute, by its terms, applies to the Ohio river only at points within one hundred yards of the mouth of any stream emptying into said river from the Indiana side. Burn's Ann. Ind. Sts. 1908, sec. 2541.

A full and correct understanding of the case may be aided by a brief historical review of the registration by Virginia which led up to the creation of the State of Kentucky and its admission into the Union, in 1792.

50 In colonial times the present States of Kentucky and Indiana, and other States north of the Ohio river, constituted a part of the territory of Virginia. At the breaking out of the Revolution, Fincastle county comprised the portion of Virginia West of the Alleghaney Mountains and south of the Ohio river. In 1776, in the first year of the Commonwealth of Virginia, Fincastle county was abolished and its territory cut up into the counties of Kentucky, Washington, and Montgomery. 9 Hening's Sts. Lar. 257, 1 Litt. Laws of Kentucky 626, Carroll's Ky. Sts., (1915) sec. 186.

Kentucky county as thus constituted comprised the territory of the present State of Kentucky, which was further cut up in 1780, into the three counties of Jefferson, Lincoln, and Fayette. At this time Virginia, being the owner of the territory on both sides of the Ohio river, also owned that river as completely as Kentucky now owns Green river, or Kentucky river, which flow through its territory.

Pursuant to negotiations begun in 1781 with the Federal government as it then existed under the Articles of Confederation, Virginia, in 1784, ceded to the federal government all of its territory "situated, lying and being to the northwest of the Ohio river," upon the condition that it should be divided into three or more states to become a part of the federal Union. 8 Fed. Sts. Ann. 17;

51 11 Hening Sts. Lar. 320.

This left the Ohio river in its original position as to ownership; it still belonged to the State of Virginia.

The relation of the State of Virginia to the Ohio river, and the relation of Kentucky thereto after it became a state, was well stated by Chancellor Bibb, in his opinion delivered upon the trial of McFarland v. McKnight, in the Louisville Chancery Court, and printed at the direction of the Court of Appeals in 6 B. M. 500, as its opinion, upon the appeal.

Chancellor Bigg said:

"Formerly the State of Virginia owned the lands on both sides of the Ohio river, from the northern boundary line of Virginia to the mouth of the Ohio, and exercised over the river the right of domain, empire, sovereignty, and jurisdiction. This possession on both sides of the river, gave to Virginia, according to the principles of the law of nations, the domain, empire, sovereignty and jurisdiction over that part of the Ohio river flowing through her territory. The right of passage upon the Ohio river, through the State of Virginia, for the purposes of navigation, trade and commerce, which belonged to others not citizens of Virginia, as well as to her own citi-
52 zens, are held in subordination to the general domain, empire, sovereignty and jurisdiction of the State of Virginia. Crimes and wrongs against the public or against individuals, committed and done on the Ohio, from the northern boundary of Virginia to the mouth, were properly cognizable by the State of Virginia, to prohibit, punish, and redress. The right of passage and use, for the lawful and innocent purposes of navigation, trade, and commerce, did not take away the sovereignty and jurisdiction of the State of Virginia, to legislate and prohibit those using the passage and water of the Ohio river, within her territory, from doing mischief to the State or her citizens, or foreigners, or their property, within the limits of Virginia."

In the same opinion it is further said:

"The State of Virginia ceded to the United States the territory lying northwest of the Ohio river. By this cession the domain, empire, sovereignty and jurisdiction of Virginia over the river Ohio, did not pass, but remained in that State. By the erection of Kentucky into an independent State, by the compact between Virginia and Kentucky, and the limits assigned to the new State, and the assent of the Congress of the United States to that compact, Kentucky, as a State, became invested with the domain, sovereignty and jurisdiction over the Ohio river, from its mouth up to Big Sandy river, as fully as formerly held and possessed by the State of
53 Virginia.

"By this right of domain, sovereignty and jurisdiction, the whole power, legislative, executive and judicial, belongs to the State of Kentucky, over the waters of the Ohio river to the northwestern shore or bank along its course from the mouth of Big Sandy river to the mouth of the Ohio River; and this power and jurisdiction is plenary, to define and to punish crimes and offences against the public peace, and to prohibit and redress wrongs, the better to protect and foster the proper and innocent purposes of navigation, trade and commerce. The act of Kentucky in question, is cautiously framed, so as to designate that part of the Ohio River which is within the limits and rightful jurisdiction of this State, and no more. It is a solemn duty which Kentucky owes to other States and Nations, and to her own citizens in particular, to take care that the right to use the river within her limits, for the innocent, commendable and rightful purposes and natural ends of navigation, trade and commerce, be not perverted and abused to means of annoyance and mischief. This duty is incumbent on her as a civilized State, having place

among the nations and governments of this earth; it is a moral duty which she owes, particularly to her own citizens."

54 This view was expressed by Chief Justice Marshall in writing the opinion for the court in Handly v. Anthony, 5 Wheat. 694, where, in speaking of the cession of the North West territory by Virginia, he said:

"She conveys to congress all her right to the territory 'situated, lying, and being, to the northwest of the river Ohio,' and this territory, according to express stipulation, is to be laid off into independent states. These states, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country.

"When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But, when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river with its own domain, and the newly created state extends to the river only."

The cession then of Virginia's domain "northwest of the Ohio river" being clearly exclusive of that stream, left her proprietorship unaffected; and, Kentucky's proprietorship upon its creation as a state, was the same.

55 McFarland vs. McKnight, supra; Blanchard v. Porter, 11 Ohio 138.

It has become a well recognized rule of construction that where a river separates two states, if one of them was the original proprietor of the lands on both sides, and ceded the land on the opposite side, the grant running from the river, the original proprietor is deemed to have retained the stream, unless the contrary intent clearly appears; but, where neither state was the original proprietor, then the territory of each runs to the middle line of the main channel, in the absence of a contrary agreement. Handly v. Anthony, supra; Howard v. Ingersoll, 13 Howard 381; Fleming v. Kenney, 4 J. J. M. 158.

Consequently, it has been settled for more than a century that after the cession of the Northwest Territory, Virginia remained the proprietor of the Ohio river and its bed to low water mark on northwestern shore, and that Kentucky succeeded to this proprietorship from her eastern line westward to the Mississippi river. Handly v. Anthony, supra; Fleming v. Kenny, supra; Church v. Chambers, 3 Dana 279; McFarland v. McKnight, supra; McFall v. Com-

56 monwealth, 2 Met. 394; Louisville Bridge Co. v. Louiisville, 81 Ky. 189; Indiana v. Kentucky, 136 U. S. 1.

The proprietorship of Kentucky and its attendant jurisdiction are subject only to the limitations that were laid thereon in the compact between Virginia and Kentucky. That compact was finally embodied in an Act of the General Assembly of Virginia, passed December 18th, 1789, and contains the terms and conditions upon which Kentucky was erected into an independent State. The seventh clause of the compact reads as follows:

"The use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth, lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth and of the proposed State on the river as aforesaid, shall be concurrent only with the States which may possess the opposite shores of the river." 13 Hening's St. Lar., p. 19; Carroll's Ky. Sts. 1915, p. 20.

The compact with Virginia was, by reference, specifically incorporated into the first three constitutions of Kentucky. Const. 1792, Art. 8, sec. 7; Const. 1799, Art. 6, sec. 9; Const. 1850, Art. 8, sec. 9. And although the federal government made no objection to the Constitution of 1792, which made the compact with Virginia a
57 part of its fundamental provisions, and never formally approved that constitution, nevertheless Kentucky entered the federal Union under its constitution of 1792, by virtue of the anticipatory Act of Congress approved February 4th, 1791, which had declared that upon the first of June 1792 the new State of Kentucky would be admitted as a new and entire member of the United States of America. 1 U. S. St. Lar. 189.

So, the limitation upon Kentucky's exclusive ownership and jurisdiction of the Ohio irver is to be measured by the meaning we shall give the words "concurrent jurisdiction" as used in the Virginia compact, supra.

There have been many cases in which the words "concurrent jurisdiction" have been defined generally, or defined in connection with particular facts. A majority of these decisions have arisen in cases where the middle thread of the stream constituted the boundary between States, thus leaving to each State the ownership of a portion only of the bed of the river.

The peculiar character, however, of the Ohio river, lying, as it does, entirely within the boundary of the State of Kentucky,
58 clearly differentiates it from other dividing waters, such as the Columbia, the Mississippi, the Missouri, and the Hudson rivers, whose middle threads divide the territories of the respective States occupying their opposite shores.

It should not be forgotten that "concurrent jurisdiction" does not include the sovereignty or ownership of the river. That jurisdiction is conferred, not for the purpose of destroying the title of either sovereign, but to render more efficient the policing of the stream, and to prevent the loss and confusion which would result from defeating actions by pleas to the jurisdiction, when it might be difficult to determine precisely where the act occurred.

It would, however, be a harsh rule that would give each State the power to exclusively establish its own laws over the entire water, regardless of its boundary line, because laws might be enacted which were diametrically opposed. For example, the laws of one State might favor slavery, and an act providing that any one who attempted to aid the escape of a slave by transporting him across the boundary river, should be guilty of a misdemeanor; while the other State

might be opposed to slavery and make it a misdemeanor to refuse to assist the escape of a slave. Such a condition would plainly defeat the very purpose for which the concurrent jurisdiction over the stream was granted. And, giving this idea a universal application, it was said In Re Mattson, 69 Fed. 535, that the concurrent jurisdiction of a State to enact penal laws respecting a river forming the boundary between it and another State means the power to enact such criminal laws as are agreed to, or acquiesced in, by such other State, or are in force within it.

Appellant contends that the rule announced in the Mattson case, supra, and followed in Ex Parte Desjeiro, 152 Fed. 1004, is applicable, and controlling in this case. In those cases the court said that the word "concurrent," in its legal and generally accepted definition, means acting in conjunction, and when applied to the jurisdiction of Oregon to enact penal laws for the Columbia River, it could only mean the power to enact such criminal statutes as are agreed to, or acquiesced in by the State of Washington, or, as are already in force within its jurisdiction.

And, applying the rule to the facts of those cases, the court in each instance held that a criminal law of one State could not be enforced upon any part of the Columbia River, which was the dividing line between the States, unless the law had been agreed to or acquiesced in by the other State.

It would seem, however, that the jurisdiction must be somewhat broader than this. A State should not be lightly held to have surrendered its right to enact laws which it can enforce to the limits of its boundary, or which can be enforced against its own citizens.

It is an elementary proposition that a State may authorize or forbid the doing of acts which depend upon territorial rights, such as the regulation of fisheries, or the placing of structures upon the bed of the stream, or permitting obstruction of navigation on its own part of the stream, which acts cannot be interfered with by the owner of the opposite shore. It cannot, however, forbid fishing in the opposite half of the stream, or the placing of obstructions there, when those acts are authorized by the laws of the owner of that side of the stream.

In Wedding v. Meyler, 192 U. S. 573, 66 L. R. A. 833, the question involved was whether Indiana's concurrent jurisdiction authorized an Indiana sheriff to serve a summons upon a defendant while he was on a boat anchored in the Ohio river below low water mark. It was held that the sheriff did have the right, since one of the rights of concurrent jurisdiction was to administer the law of Indiana on the Ohio river below the low water mark, and that Indiana's concurrent jurisdiction was not restricted to legislative acts.

In speaking of the "concurrent jurisdiction" given to Indiana over the Ohio river by the Virginia Compact, the Supreme Court of the United States, in Wedding v. Meyler, supra, said:

"The question that remains, then, is the construction of the Virginia compact. It was suggested by one of the judges below that the words 'the respective jurisdiction * * * shall be concurrent only with the states which may possess the opposite

shore' did not import a future grant, but only a restriction; that they excluded the United States or other states, but left the jurisdiction of the states on the two sides to be determined by boundary, and therefore that the jurisdiction of Kentucky was exclusive up to its boundary line of low-water mark on the Indiana side. This interpretation seems to be without sufficient warrant to require discussion. A different one has been assumed hitherto, and is required by an accurate reading. The several jurisdictions of two states respectively over adjoining portions of a river separated by a boundary line is no more concurrent than is a similar jurisdiction over adjoining counties or strips of land. Concurrent jurisdiction, properly so-called, on rivers, is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase. See Sanders v. St. Louis & N. O. Anchor Line, 97 Mo. 26, 30, 3 L. R. A. 63 390, 10 S. W. 595; Opsahl v. Judd, 30 Minn. 126, 129, 130, 14 N. W. 575; J. S. Keator Lumber Co. v. St. Croix Boom Corp., 72 Wis. 62, 7 Am. St. Rep. 837, 38 N. W. 529, and the cases last cited.

"The construction adopted by the majority of the court of appeals seems to us at least equally untenable. It was held that the words 'meant only that the states should have legislative jurisdiction.' But jurisdiction, whatever else or more it may mean, is jurisdiction in its popular sense of authority to apply the law to the acts of men. Vicat, Vocab. sub. v. See Rhode Island v. Massachusetts, 12 Pet. 657, 718, 9 L. ed. 1233, 1258. What the Virginia compact most certainly conferred on the states north of the Ohio was the right to administer the law below low-water mark on the river, and, as part of that right, the right to serve process there with effect. State v. Mullen, 35 Iowa, 199, 205, 206. What more jurisdiction, as used in the statute, may embrace, or what law or laws properly would determine the civil or criminal effects of acts done upon the river, we have no occasion to decide in this case. * * *

64 "To avoid misunderstanding it may be well to add that the concurrent jurisdiction is jurisdiction 'on' the river, and does not extend to permanent structures attached to the river bed and within the boundary of one of the other States. Therefore, such cases as Mississippi & M. R. R. v. Ward, 2 Black 485, do not apply. State v. Mullen, 35 Ia. 199, 206, 207."

A good illustration of the enforcement by a State of its own penal laws upon a boundary stream is afforded by Dugan v. State, 125 Ind. 130, 9 L. R. A. 321.

In that case, a steamboat having its home port in Kentucky was engaged in running Sunday excursions on the Ohio river between Jeffersonville and Fern Grove, points in Indiana, in violation of the Indiana Sunday law. The Indiana statute was violated by acts upon its bordering river, having their beginning and ending on land within the borders of the State. It was held that the Indiana 65 court had jurisdiction of a prosecution against the pilot of the boat, and the mere fact that the boat and its officers were non-residents, was immaterial.

In McFall v. Commonwealth, 2 Met. 394, McFall, a Cincinnati justice of the peace was indicted and convicted for unlawfully solemnizing a marriage while on a ferry-boat midway on the Ohio river between Newport, Ky. and Cincinnati, Ohio. The conviction was upheld, upon the ground that the offense was committed within the boundary of the State of Kentucky, the court citing Handly v. Anthony, supra, and Fleming v. Kenney, supra.

This view is expressed in Nielson v. Oregon, 212 U. S. 315. In that case Nielsen was operating a purse net in the Columbia river which was the boundary line between Oregon and Washington, but at a point in the river which was north of the middle channel thereof, and consequently within the territorial limits of the State of Washington. Fishing with a purse net was prohibited by the laws of Oregon, but was permitted by the laws of Washington; indeed, Nielson had a license to so fish, issued by the State of Washington.
66 The State of Oregon indicted Nielson, who was convicted, and the conviction was sustained by the Supreme Court of Oregon. 51 Oregon 588, 131 Am. St. Rep. 765, 16 Ann. Cas. 1113. But, upon appeal to the Supreme Court of the United States, that court said:

"The present case is not one of the prosecution for an offense malum in se, but for one simple malum prohibitum. Doubtless the same rule would apply if the act were prohibited by each state separately; but where, as here, the act is prohibited by one state and in terms authorized by the other, can the one state which prohibits prosecute and punish for the act done within the territorial limits of the other? Obviously, the grant of concurrent jurisdiction may bring up, from time to time, many and some curious and difficult questions, so we promptly confine ourselves to the precise question presented. The plaintiff in error was within the limits of the state of Washington, doing an act which that state in terms authorized and gave him a license to do. Can the state of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that
67 state had specially authorized him to do? We are of opinion that it cannot. It is not at all impossible that, in some instances, the interest of the two states may be different. Certainly, as appears in the present case, the opinion of the legislatures of the two states is different, and the one state cannot enforce its opinion against that of the other; at least, as to an act done within the limits of that other state. Whether, if the act of the plaintiff in error had been done within the territorial limits of the state of Oregon, it would make any difference, we need not determine; nor whether, in the absence of any legislation by the state of Washington authorizing the act, Oregon could enforce its statute against the act done anywhere upon the waters of the Columbia. Neither is it necessary to consider whether the prosecution should be in the names of the two states jointly. It is enough to decide, as we do, that, for an act done within the territorial limits of the state of Washington, under au-

thority and license from that state, one cannot be prosecuted and punished by the state of Oregon."

In closing its opinion last quoted from, the court referred to In Re Mattson, supra, and Ex Parte Desjeiro, supra, relied upon by appellant, but without approving them. The opinion in Nielsen v. Oregon substantially overrules In Re Mattson and Ex Parte Desjeiro, since it holds, in effect, that a state can enforce its own
68 criminal laws within its boundary, and declined to adopt the definition of "concurrent jurisdiction" given in those cases, although it was urged upon the court.

This authority from the highest tribunal that can pass upon the question would seem to end the discussion and require an affirmance of this case, since, under it, the Kentucky court had jurisdiction to punish a citizen of Kentucky for an infraction of its laws within its boundary. Whether Indiana courts have a similar power, and if so, what is the extent of that power, are immaterial questions, in this proceeding.

This view is in accord with the decisions of those state courts which have passed upon the question.

In J. S. Keator Lumber Co. v. St. Croix Boom Co., 76 Wis. 62, 7 Am. St. Rep. 837, the defendant obstructed the St. Croix River, which constituted the boundary line between Wisconsin and Minnesota, by maintaining a boom and other obstructions thereon, whereupon the plaintiff sued for damages. The defendant was authorized by its Minnesota charter to construct its booms upon the St. Croix River, and the boundary line between the two states
69 where the boom was constructed was the main channel of the St. Croix. The authority of Minnesota alone to grant such a charter was conceded, unless she was deprived of that right by that clause contained in her constitution, as well as in the Wisconsin constitution, which secured to each state "concurrent jurisdiction" on that river. It became necessary, therefore, to define the phrase "concurrent jurisdiction," and, in doing so, the Supreme Court of Wisconsin said:

"Are the words 'concurrent jurisdiction,' as thus used, to be construed as requiring the joint action of both states to give validity to such a charter, or could Minnesota do so alone, with the corresponding right in Wisconsin to grant a similar charter? If such joint action was necessary to give such validity, then the refusal or mere failure of the one state to so act would wholly prevent the exercise of any jurisdiction by either state. 'Concurrent jurisdiction' are words usually applied to two or more courts. When so applied, no one has ever pretended that the exercise of such jurisdiction by the one court was dependent upon its concurrent exercise by any other court. On the contrary, all recognize the authority of each such tribunal to deal with the same subject-matter, at the choice of the suitor. This is illustrated by the jurisdiction of state and federal courts in the same territory, as to controversies between citi-
70 zens of different states and also as to other matters. They never concur in each other's actions, but each proceeds separately and independently of the other. The same is true respecting

offenses and torts committed upon a river dividing two states, where the courts of each have jurisdiction of the same; for in such case each court must necessarily act separately and independently of the other. * * *

"The words 'concurrent jurisdiction' must have been used, in the compact between the federal government, Wisconsin, and Minnesota, in the sense in which they had previously been used and were generally understood. When, therefore, by such compact it was in effect provided that each such state shall have 'concurrent jurisdiction' on that portion of the River St. Croix constituting the boundary line between them, it included the exercise of such legislative powers by each state over the whole river as were consistent with the exercise of similar powers over the same *pro*tions of the river by the other state. In other words, by such compact each state secured to itself such 'concurrent jurisdiction' upon the half of the river within the territorial limits of the other state, by reducing what would otherwise have been its exclusive jurisdiction upon its own half to mere 'concurrent jurisdiction.' The result is, that neither of these states could, as against the other, rightfully assume,
71 or authorize the assumption of, permanent and exclusive occupancy, possession, and control of the entire navigable portions of the river: President etc. v. Trenton City Bridge Co., 13 N. J. Eq. 46; Attorney-General v. D. & B. B. R. R. Co., 27 Id. 631. Of course, no two structures or bodies can occupy precisely the same space at the same time upon a river, any more than elsewhere. Nevertheless, either state may, in aid of navigation, assume, or authorize the assumption of, reasonable occupancy, possession, and control of portions of such navigable waters, provided the same is reasonably consistent with similar occupancy, possession, and control which may be assumed or authorized by such other state. Concurrent jurisdiction, to be of value to the respective states or to any one, must have a practical application. Such application should, moreover, be consistent with the reasonable continuence of a navigable channel as a public highway between such states, and must necessarily remain subject to any regulation of commerce by Congress under the commercial clause of the federal constitution."

State v. Cunningham, 102 Miss. 237, Ann. Cas. 1914 D 182, decided in 1912, contains, perhaps, the ablest decision of this question of concurrent jurisdiction, that is to be found in the books.

While conducting a bar room on a ferry boat plying between Helena, Ark., and Trotters Point, Mississippi, on the oppo-
72 site shore of the Mississippi river, and while in that part of the river which was west of the center or thread of the river, Cunningham sold intoxicating liquors in violation of the laws of Mississippi. He was indicted, tried and acquitted.

Pursuant to authority granted by Congress to fix their boundary line, and the criminal jurisdiction of the states of Mississippi and Arkansas, the jurisdiction of Mississippi was extended to the west bank of the river, and the jurisdiction of Arkansas was extended to the east bank, each state to have concurrent criminal jurisdiction

over the river, whether the offense be committed on the Mississippi or Arkansas side.

In reversing the judgment of acquittal, the court, speaking through Chief Justice Mayes, said:

"Under the resolution of Congress and under the compact between the states of Mississippi and Arkansas, the fullest jurisdiction is granted to each state to exercise criminal jurisdiction over the waters of the Mississippi river; each state making and executing its own laws. This criminal jurisdiction extends to all kinds of crimes, both malum in se and malum prohibitum. Each state has a right to determine for itself what it shall constitute as a crime
73 within its jurisdiction, and if these things are done on the waters of the river, it may punish in its own courts for the doing of the things, on the waters of the river, which are denounced by its laws, whether the other state has the same law or not. The jurisdiction given to the states enables them to legislate as to what shall constitute a crime in its jurisdiction, as well as to conduct prosecution in its courts for crimes which were such at the date of the compact between the states.

"On the other hand, neither state can conduct a prosecution against any person for the doing of a thing upon the waters of the river which constitutes a crime only under the laws of the other state. Each state must conduct its prosecutions fro such crimes as are denounced by its own laws, and, in case the act is a crime in both states, then the state first acquiring jurisdiction shall conduct the prosecution to its final determination, and when the prosecution is so conducted it is a bar to any further proceedings in the courts of the other state, even though the punishment may be different in each state. Concurrent jurisdiction of this character cannot be given to sovereign states without its perplexities and confusion, but we think the authorities are all in accord with the rul- of law as we now announce it."

74 Lemore v. Commonwealth, 127 Ky. 480, is to the same effect.

State v. Moyers, 155 Iowa 678, 41 L. R. A. (N. S.) 366, is directly in point. In that case, Moyers was prosecuted, in an Iowa court, for *finishing* with a hoop net in the Mississippi river which formed the boundary line between Iowa and Illinois, without having obtained the license required by the laws of Iowa. Under the Acts of Congress of 1818 and 1845 admitting Illinois and Iowa, respectively, into the Union, those states "have concurrent jurisdiction on the river Mississippi," the middle thread of the river, however, being the boundary line between the two states.

Moyers was acquitted in the district court, under a direction from the court, because it did not appear that he was fishing on the westerly or Iowa side of the river.

In holding that ruling to be erroneous, the court said:

"An examination of the various cases relating to the subject of concurrent jurisdiction over boundary rivers develops the fact that great difficulty has been experienced in determining its nature and scope. We think that the meaning of the term as used in the acts

of Congress conferring such concurrent jurisdiction upon the various states may be ascertained with some reasonable accuracy by
75 taking into account the difficulties evidently intended to be avoided.

"As suggested by this court in State v. Mullen, supra, a manifest purpose was to avoid the question so difficult of determination, as to whether a criminal act was committed on one side or the other of the imaginary boundary line, which might often be a matter of uncertainty. To the same effect, see State v. George, 60 Minn. 503, 63 *N.* W. 100. This evident purpose of Congress is not accomplished if in any kind of a judicial proceeding the jurisdiction of the court over the subject-matter is dependent upon the relation of the transaction as to the place of its occurrence to the exact boundary line of the state. Nor will such purpose be accomplished if it is held that the laws of the state are of no force or effect beyond this boundary line; for the courts of the state would in that event be called upon to determine in each case involving the application of its laws to a transaction on the river, whether the transaction were on the one side or the other of this boundary line.

"The whole question seems to turn ultimately on the meaning to be given to the phrase 'concurrent jurisdiction.' If the purpose of Congress was to give to each of the states bordering on the river no other power than to enforce its laws with reference to trans-
76 actions on that part of the river included within its boundary line, then no purpose whatever was served beyond that which would have been accomplished by fixing the boundary line itself, for complete jurisdiction up to that boundary line would thereby have been vested in the adjoining states. Certainly something more was intended, and the thing evidently intended was that all the jurisdiction which might otherwise have been exercised by the state with reference to transactions on the river within the boundary line should be possessed and exercised by the state with reference to like transactions on any part of the river without regard to the boundary. This conclusion is in accordance with the great preponderance of authority in relation to similar questions. J. S. Keator Lumber Co. v. St. Croix Boom Corp. 72 Wis. 62, 7 Am. St. Rep. 837, 38 N. W. 529; Opsahl v. Judd, 30 Minn. 126, 14 N. W. 575; Carlisle v. State, 32 Ind. 55; Sherlock v. Ailing, 44 Ind. 184; Memphis & C. Packet Co. v. Pikey, 142 Ind. 304, 40 N. E. 527; Dugan v. State, 125 Ind. 130, 9 L. R. A. 321, 25 N. E. 171; Welsh v. State, 126 Ind. 71, 9 L. R. A. 664, 25 N. E. 883; State v. Metcalfe, 65 Mo. App. 681; Wiggins Ferry Co. v. Reddig, 24 Ill. App. 260; Harrell v. Speed, 113 Tenn. 224, 1 L. R. A. (N. S.) 639, 106 Am. St. Rep. 814, 81 S. W. 840, 3 Ann. Cas. 260; State v. Faudre, 54 W. Va. 122, 63 L. R. A. 877, 102 Am. St. Rep. 927, 46 S. E. 269,
77 1 Ann. Cas. 104; McFall v. Com., 2 Met. (Ky.) 394. The use of the term is not to be construed as requiring joint action of the two states. J. B. Keator Lumber Co. v. St. Croix Boom Corp., supra. Manifestly this is so, for joint action in the exercise of jurisdiction over the river would be impracticable. Neither the legislatures nor the courts of the two states could make a joint

arrangement by which the laws of the one should not be operative on the river, unless they coincided in every way with the laws of the other. No state of the Union can, without the consent of Congress, enter into any agreement or compact with another state. U. S. Const. art. 1, sec. 10, par. 3. In effect, the states are by this provision of the Constitution incapable of entering into treaties with each other."

In some of the cases it is held that "concurrent jurisdiction" does not include the power to regulate the right to fish in boundary waters.

Thus, in Roberts v. Fullerton, 117 Wis. 222, 65 L. R. A. 953, it appeared that the federal statute gave Minnesota and Wisconsin concurrent jurisdiction on the waters of the Mississippi river, and the plaintiff sued the defendant for damages for taking the plaintiff's fish net from where it was located by him to catch fish in the waters of Lake Pepin, the net being staked to the bottom of
78 the Lake. Defendant answered, admitting the allegations of the compiaint, and pleading, in justification, that he acted as an officer of the State of Minnesota. A demurrer was sustained to the answer, whereupon the defendant appealed.

In affirming the decision of the lower court, the Wisconsin Supreme Court said:

"Without proceeding further in our investigations, we are satisfied that the term 'concurrent jurisdiction' was used in the acts admitting, or providing for the admission of, Wisconsin and Minnesota into the Union in the same sense in which it had theretofore been used as applicable to similar situations, both in written and unwritten laws,—in the same sense that it is said concurrent jurisdiction exists by comity of nations upon waters divided by their boundary line, unless otherwise provided by some written law.

"Tested by the principle above adopted, do the mere police regulations of one country regarding the exercise of the common right of fishing extend into the ter-itory of a foreign jurisdiction, the two being separated by and imperceptible boundary line in a river or lake? Is the common right of fishing which belongs to the people of this state within all that part of its territory on the easterly side of the main channel of the Mississippi river subject to the laws of the state of Minnesota? There is no escaping the conclusion that, if such is the case, it is competent for that state to extend its
79 police regulations as regards fishing and hunting over a large part of — waters of Lake Superior on the Wisconsin side, reaching up to the shore line, and for the state of Michigan to extend its laws on Lake Michigan on the same subject to the Wisconsin shore. We have searched in vain to find authority to sustain the affirmance of the proposition suggested. In no instance recorded in the books has one country been held entitled to exercise jurisdiction to regulate the common right of fishing in the territory of a foreign state under the measure of concurrent jurisdiction commonly exercised by the two on the waters divided by their boundary line. We venture to say that such concurrent jurisdiction has never

been successfully invoked to justify interference by one state or country with the enjoyment of the right to fish within the territorial boundaries of the other. It would be foreign to the necessities of this case to enter into a discussion regarding the limits of that jurisdiction. It is sufficient for this case that we have reached the conclusion that, while it refers to acts of a criminal or civil nature on the water, or acts in some way connected with the use of the water for navigable purposes, it does not extend to the right of one state by legislative enactment to govern the fishery rights of the people in a foreign jurisdiction. As we have before seen, this country and the British provinces exercise concurrent jurisdiction over
80 the waters divided by their boundary line, and the same is true as to this country and Mexico. No one would venture to say that one country could enforce its laws for the preservation of fish or regulating the taking of fish within the territorial limits of the other. It is to be regretted that the nature of the authority on waters of the Mississippi, exercisable by Wisconsin and Minnesota, has not been heretofore definitely decided. No court has yet dealt with the subject, or the meaning of the language requiring construction in similar situations, so as to cover the whole thereof satisfactorily, if at all. Many judges have deplored the uncertainty existing, but have found a convenient way of escaping the labor of removing it. The interests at stake are so great that it is not to be wondered that anyone appreciating the same should hesitate long before entering upon the difficult task of solving completely the troublesome question suggested. There is a concensus of opinion that concurrent jurisdiction does not mean concurrent dominion, and that it refers only to things afloat or on the water in some reasonable view of the situation, or so circumstanced as to be legitimately regarded as connected with the use of the water for navigable purposes. That is about as far as the courts have gone. In Garner's Case, 3 Gratt. 655, 676,—a case decided in a jurisdiction
81 where, if anywhere, we would expect the term under discussion to have had a well-defined and well-understood meaning at an early day,—while the judges in lengthy opinions severally referred to it, not one of them attempted to define it. Judge Taliaferro said, it refers 'only to things afloat' at best. 'The questions is a very important one, and I decline stating any opinion, when it does not necessarily arise in the case.' Justice Fry said (P. 752): 'What is the precise meaning of concurrent jurisdiction I am not prepared to say. It strikes me as equivalent to common.' It is our opinion that the term refers to that authority commonly exercised concurrently upon the water divided by the boundary line between two countries, according to the public law as recognized in this country at the time the use of the term became common in our legislative history; that it refers to matters at least in some way connected with the use of the water for navigable purposes, to things afloat, or in some legitimate sense on the water,—things difficult to deal with if it were necessary to determine in each instance of the exercise of jurisdiction the precise location of the particular act involved as regards the boundary line; but that

82 it does not include the right to regulate the enjoyment, by the people of one state within its domain, of rights incident to their situation, such as the right to navigate or fish. It does not empower one state to spread its mere police regulations over territory of another, regulating the sovereign property right of the latter in or to the water flowing over such territory, or to the fish therein or fowls thereon, which it holds in trust for the enjoyment of the whole people within its boundaries, in their individual capacities, under such legal restraints as such other, in its legislative wisdom, may see fit to impose,—so long as such enjoyment does not interfere, unlawfully, with like enjoyment by the people of the state on the opposite side of the boundary."

State v. Bowen, 149 Wis. 203, 39 L. R. A. (N. S.) 200, is to the same effect, holding that the jurisdiction of a state for the enforcement of its fish and game laws is co-extensive with and limited by the boundaries of *the*, even though they consist of the thread of a navigable stream over whose waters the adjacent states have concurrent jurisdiction for other purposes.

These decisions are rested upon the well-established principle that by reason of the state's control over fish and game within its limits, it is within the police power of its legislature, subject to con-
83 stitutional restrictions, to enact such general or special laws as may be reasonably necessary for the protection and regulation of the public's right in its fish and game, even to the extent of restricting the use of, or right of property, in the game after it has been taken or killed. 19 Cyc. 1006, 1008, 1012; Greer v. Connecticut, 161 U. S. 529; Wharton v. Wise, 153 U. S. 155; United States v. Alaska Packers Association, 79 Fed. 152.

The Act of 1916, now under consideration, was passed by virtue of that power; and similar statutes have been enacted in most of the states. If it were necessary for Indiana to pass similar laws, or to consent to the statutes enacted by the legislature of Kentucky upon the subject, or vice versa, there would be no protection whatever for the fish in the Ohio river, since it is practically impossible to get the legislatures of different states to cooperate to that extent.

The concurrent jurisdiction of Indiana and Kentucky requires neither state to consent to the laws of the other, or to agree upon the enactment of statutes, in order to exercise their respective
84 jurisdictions. Neither state has ever entertained so impracticable an idea. The cases showing that Kentucky has separately exercised her jurisdiction, have heretofore been cited. Indiana has repeatedly exercised her jurisdiction in precisely the same way. Carlisle v. State, 32 Ind. 55; Sherlock v. Alling, 44 Ind. 184; Dugan v. State, 125 Ind. 130, L. R. A. 321; Welsh v. State, 126 Ind. 71,) 9 L. R. A. 664; M. & C. P. Co. v. Pikey, 142 Ind. 304.

Both states have proceeded upon the theory that concurrent jurisdiction means jurisdiction of two powers over one and the same place, as defined by the United States Supreme Court in Wedding v. Meyler, supra; each state making and executing its own laws, without considering whether the other state had the same laws or not.

To say that the jurisdiction is joint, thereby requiring the joint

action of the two states, would not only deprieve each state of the jurisdiction expressly conferred upon it by the compact with Virginia with the consent of Congress, but it would require the two states to make an agreement or compact by which the laws of one should not be operative on the river, unless they coincided in every way with the laws of the other—an arrangement expressly
85 forbidden by section 10 of article 1 of the federal constitution. State v. Moyers, supra.

As stated by Rorer, this concurrent jurisdiction is given over the river and not of the laws of the abutting states. Rorer on Interstate Law, p. 438.

The adjudications of courts of last resort sustaining this view are quite numerous, as is above shown, while the theory that concurrent jurisdiction means "joint" jurisdiction has been countenanced only in In re Mattson (1895), supra, and Ex Parte Desjeiro (1907), supra, both decided in the U. S. circuit court for the district of Oregon. Neither of these cases has ever been approved or followed by any other court; and, in view of the later federal cases of Neilson v. Oregon, supra, and Columbia River Packers Assn. v. McGowan, 72 Fed. 991, they must be considered both as unsound in principle and against the great weight of authority.

So, whether we apply the rule that a state has jurisdiction of offenses committed within its boundary; or construe the concurrent jurisdiction of Kentucky to give it jurisdiction over the whole of the Ohio river regardless of the location of the boundary line be-
86 tween Kentucky and Indiana; or apply the doctrine that the State of Kentucky has the right to protect the fish within its limits the judgment of the circuit court will have to be affirmed.

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Joseph G. Sachs, Jr., for appellee, Louisville, Ky.; and Kentucky Game & Fish Commission, Amicus Curiæ, John J. Sullivan, Asst. Co. Atty. C. & R.

87 *Pet. for Writ of Error, Assignment, &c.*

And on January 3, 1917, there was filed in the office of the Clerk of the Court of Appeals, a Petition for Writ of Error, which is as follows:

Court of Appeals of Kentucky.

FRANK NICOULIN, Appellant,

vs.

JOHN J. O'BRIEN, Appellee.

Petition for Writ of Error, Assignment, and Prayer.

Considering himself aggrieved by the final decision of the Court of Appeals in rendering judgment against him in the above entitled

case, the appellant hereby prays a writ of error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of the cost bond.

And the said Frank Nicoulin assigns the following errors in the records and proceedings of the case.

The Court of Appeals of Kentucky erred in holding and deciding that Section 2 of Chapter 29 of the Acts of the Kentucky Legislature of 1916 was valid. The validity of said section was denied and drawn in question by the appellant on the ground of its being repugnant to the Constitution of the United States and in contravention thereof. The said errors are more particularly set forth as follows:

The Court of Appeals of Kentucky erred in holding and deciding:

88 First. That said Section 2 did not abridge the privileges and immunities of citizens or of this appellant as guaranteed by the Fourteenth Amendment of the Federal Constitution.

Second. That said Section 2 as applied to this appellant did not impair the obligation of contracts, in that it is repugnant to Section 7 of the compact between the States of Virginia and Kentucky, contrary to the provisions of the Federal Constitution, Article 1, Section 10.

For which errors the appellant Frank Nicoulin prays that the said judgment of the Court of Appeals of Kentucky, dated November 29, 1916, be reversed and a judgment rendered in behalf of the appellant and for costs.

AUGUSTUS EVERETT WILSON.
EDMUND ANDREW LARKIN.
RICHARD PRIES T DIETZMAN.

89 STATE OF KENTUCKY,
Court of Appeals, ss:

Let the writ of error issue upon the execution of a bond by the appellant, Frank Nicoulin, to the appellee, J. J. O'Brien, for costs, in the sum of $1,000.00.

W. E. SETTLE,
Chief Justice, Court of Appeals of Kentucky.

Dated January 3, 1917.

90 *Writ of Error.*

And then on the 15th day of January, 1917, there was filed in office of the Clerk of the Court of Appeals, the following Writ of Error, which is as follows:

UNITED STATES OF AMERICA, *ss:*

To the President of the United States of America to the Honorable Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said Court before you, or some of you, being the highest Court of law or equity of said State in which a decision could be had in the said suit between Frank Nicoulin appellant and John J. O'Brien, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a Statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution treaties or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commissioner; a manifest error hath happened to the great damage of the said Frank Nicoulin, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties
91 aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and *and* proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable E. D. White, Chief Justice of the United States this third day of January in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.] JOHN W. MENZIES,
Clerk of the District Court of the United States for the Eastern District of Kentucky,
By CHAS. N. WIARD,
Deputy Clerk.

Allowed January 3, 1917.
W. E. SETTLE,
Chief Justice, Court of Appeals of Kentucky.

Endorsed: 1917, January 15th. Filed. R. W. Keenon, C. C. A.
4—905

92 *Bond.*

And then on the same date, January 15th 1917, the following Writ of Error Bond was filed herein, which is as follows:

Court of Appeals of Kentucky.

FRANK NICOULIN, Plaintiff in Error,

v.

J. J. O'BRIEN, Defendant in Error.

Bond.

Know all men by these pres-nts: that we, Frank Nicoulin as principal and National Surety Company, as surety, are held firmly bound unto J. J. O'Brien in the sum of $1,000.00 to be paid to said J. J. O'Brien, to which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 3rd day of January, 1917.

Whereas the above named plaintiff in error seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Court of Appeals of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs that may be adjudged, if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

FRANK NICOULIN, *Principal.*

93 NATIONAL SURETY COMPANY,

By J. MORTON MORRIS,

Attorney in Fact.

Bond approved January 3, 1917.

W. E. SETTLE,

Chief Justice of the Court of Appeals of Kentucky.

Endorsed: 1917 January 15th. Filed, R. W. Keenon, C. C. A.

94 *Citation.*

And then on the same day, January 15th 1917, the following Citation was filed herein, which is as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. J. O'Brien, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C.

within thirty days from the date hereof pursuant to a writ of error filed in the office of the Clerk of the Court of Appeals of Kentucky, wherein Frank Nicoulin is plaintiff in error and you are defendant in error, and to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice shall not be done the parties in that behalf.

Witness the Chief Justice of the Court of Appeals of Kentucky this 3rd day of January, 1917.

W. E. SETTLE,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
RODMAN W. KEENON,
Clerk of the Court of Appeals of Kentucky.

95 I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

JOS. G. SACHS, JR.,
D. A. SACHS, JR.,
Attorneys for J. J. O'Brien and Kentucky Game & Fish Commission, Amicus Curiæ.

Endorsed: 1917 January 15. Filed, R. W. Keenon, C. C. A.

96 COMMONWEALTH OF KENTUCKY,
Court of Appeals, set:

I, Rodman W. Keenon, Clerk of the Court of Appeals of Kentucky do hereby certify, that the foregoing 95 pages constitute a full, true and complete transcript of the record in the case of Frank Nicoulin, Plaintiff in Error, against J. J. O'Brien, Defendant in Error, and all things touching the same, as appear from the records and files of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at the Capitol in Frankfort, Kentucky, on the 24th day of January, 1917.

[Seal Kentucky Court of Appeals.]

RODMAN W. KEENON,
Clerk of the Court of Appeals of Kentucky.

Fee $32.35.

Endorsed on cover: File No. 25,735. Kentucky Court of Appeals. Term No. 905. Frank Nicoulin, plaintiff in error, vs. John J. O'Brien. Filed January 31st, 1917. File No. 25,735.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1917

No. 905. [redacted]113

FRANK NICOULIN, PLAINTIFF IN ERROR,

versus

JOHN J. O'BRIEN, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

AUGUSTUS EVERETT WILLSON,
RICHARD PRIEST DIETZMAN,
EDMUND ANDREW LARKIN,
Counsel for Plaintiff in Error.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1917.

No. 905.

FRANK NICOULIN, - - - - - *Plaintiff in Error,*

versus

JOHN J. O'BRIEN, - - - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

[Points and Authorities, pp. iii-vii.]

May it please the Court:

The question involved in these proceedings is the constitutionality of Section 2, Chapter 29, of the Acts of 1916, of the Kentucky Legislature. The Court of Appeals of Kentucky held the same constitutional (Judgment—Record, page 23; Opinion—Record, p. 24, *et seq.*) and the case is now before this court on writ of error from said decision and judgment. The errors assigned (Record, pp. 39 and 40) are as follows:

The Court of Appeals of Kentucky erred in holding and deciding—

First: Said Section 2, Chapter 29 of the Acts of 1916 of the Kentucky Legislature did not abridge the privileges and immunities of citizens and of this appellant as guaranteed by the Fourteenth Amendment of the Federal Constitution.

Second: That said Section 2 as applied to this appellant did not impair the obligation of contracts in that it is repugnant to Section 7 of the compact between the States of Virginia and Kentucky, contrary to the provisions of the Federal Constitution Article I, Section 10.

A brief history of the case, at this point, will not be amiss. Frank Nicoulin, plaintiff in error, is a fisherman, residing in Louisville, Ky., and earning his living by fishing in the Ohio River at that point. On August 4, 1916, he was arrested and tried before the defendant in error, a Justice of the Peace for Jefferson County, Ky., on the charge of seining for fish in the Ohio River where it formed a part of the boundary line between Jefferson County, Ky., and the State of Indiana, and in that part of the river which was more than 100 yards from its low water mark on the Indiana side—this being one of the offenses denounced by Section 2, Chapter 29 of the Kentucky Acts of 1916, hereinafter set out in full. While admitting the fact of so fishing, Nicoulin contended that the Act under which he was being tried was unconstitutional for the same reasons as set out

in the writ of error hereinbefore referred to. Nicoulin's contention was disallowed by defendant in error, and he was found guilty and fined. Thereupon Nicoulin brought his suit in the Jefferson Circuit Court seeking a writ of prohibition to enjoin the defendant in error from enforcing his said judgment. Nicoulin's suit was founded on the same contentions as to the constitutionality of Section 2, Chapter 29 of the Kentucky Acts of 1916 as set up by him on his trial before defendant in error. The Circuit Court held the act constitutional and denied Nicoulin's prayer for the writ of prohibition. Thereupon Nicoulin appealed to the Court of Appeals of Kentucky, again urging his old contentions. The Court of Appeals affirmed the Jefferson Circuit Court and the case is now before this court on writ of error from this decision and judgment of the Court of Appeals.

It is conceded that if the Act under which plaintiff in error was tried and convicted, is unconstitutional, defendant in error was without power or jurisdiction to enter the judgment or fine he did, and that the judgments of the Circuit Court and Court of Appeals, in such state of case, are erroneous. (Pennington v. Woolfolk, 79 Ky. 15, Record, page 10.)

IS SECTION 2 OF CHAPTER 29 OF THE ACTS OF 1916 CONSTITUTIONAL?

Section 2 of Chapter 29 of the Acts of 1916 reads as follows:

> "Unlawful Contrivances for the Capture of Fish or Preventing Their Passage in Streams. It shall be unlawful for any person or persons to catch or attempt to catch any fish in any of the waters of the State except in private ponds, by the use of a wing net, set net, seine, trap, trammel net, dip net, or any other kind of a net or contrivance, for the purpose of catching fish, or that will materially hinder the passage of fish in such waters.
>
> "Such person or persons catching or attempting to catch fish by any of the above contrivances mentioned in this section shall be guilty of a misdemeanor and upon conviction thereof, before any court of competent jurisdiction, shall be fined not less than fifteen dollars ($15.00) nor more than one hundred dollars ($100.00) for each offense."

It is the contention of the plaintiff in error, as set out fully in his petition for writ of error (Record, p. 39, 40, *et seq.*), that the foregoing section of Chapter 29 of the Acts of 1916 is unconstitutional.

First: Because it is an act which impairs the obligation of contract as forbidden by Subsection 1 of Section 10 of Article I of the Federal Constitution, in that said act is in violation of or in conflict with the Seventh Clause of the compact between Virginia and Kentucky, well known as the Virginia Compact.

Second: Because it is an act which abridges the privileges or immunities of the citizens of the United States and deprives the plaintiff of life, liberty and property without due process of law and denies to him the equal protection of the law, as forbidden by the Fourteenth Amendment to the Federal Constitution.

I. IS SECTION 2 OF CHAPTER 29 OF THE ACTS OF 1916 IN CONFLICT WITH THE SEVENTH CLAUSE OF THE VIRGINIA COMPACT?

It is a matter of common learning that in the year 1784, Virginia ceded to the Confederation what is known as the Northwest Territory. One of the conditions of the cession was that "the said territory shall be laid out and formed into States," which condition was accepted by the Congress of the Confederation (Handley's Lessee v. Anthony, 5 Wheaton 374). However, under this cession, title to the Ohio River and its bed to the low water mark on its northern and northwestern shore remained in Virginia and by proper descent is now in Kentucky and West Virginia. (Indiana v. Kentucky, 136 U. S. 1.) For a long time prior to 1785, the people of the District of Kentucky had been agitating for statehood. In 1785 Virginia passed an act indicating on what terms it would agree to the creation of the District of Kentucky into the State of Kentucky. This act, which was re-enacted in 1788 and 1789, by reason of its acceptance by Kentucky and the Congress of the

United States in 1791 in its admission of Kentucky into the Federal Union, became what is known as the Virginia Compact. In all of its various enactments, the Seventh Clause as it is now before this court appears in identically the same language. Henning Statutes at Large, 12 Vol. 37, 788; 13 Vol. 17. It reads as follows (record, p. 4):

> "That the use and navigation of the River Ohio so far as the territory of the proposed State or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the Citizens of the United States and the respective jurisdictions of this Commonwealth and of the proposed State on the river aforesaid shall be concurrent only with the States which may possess the opposite shores of the said river."

The plaintiff in error contends that this Seventh Clause provides that the use as well as the navigation of and the jurisdiction over the Ohio River where it forms the boundary line between Kentucky and Indiana is *concurrent* with those two States; that the power to legislate over the use and navigation of the stream is included in this grant of jurisdiction and that the right of regulating fishing is included within this right of legislation; that unless regulations concerning fishing in the Ohio River where it forms the boundary line between these two States be concurred in by both States, such regulations are invalid; that in as much as Indiana has not concurred in the new act of the Kentucky Legislature, which forms the

basis of the present proceedings, the same is in violation of the inhibition contained in this Seventh Clause of the Virginia Compact and therefore invalid.

Prior to the passage of the Act of 1916 here in question, the laws of both Kentucky and Indiana, in so far as regulation of fishing in the Ohio River was concerned, were practically identical. Such laws of Kentucky exempted from their operation "streams forming the boundary line between this and other States." (Carroll's Statutes, 1915 Edition, Section 1899.) The law of Indiana prior and subsequent to the passage of the Kentucky 1916 act, was and still is as found in Section 2541 Burns' Annotated Indiana Statutes, 1908 Edition. (Record, p. 5.) It too provided and provides that its regulations with regard to fishing should "not apply to waters of * * * the Ohio River."

Defendant in error urged below that Indiana has not as yet legislated with regard to the Ohio River so far as fishing with a seine is concerned and that it is necessary in order for the Indiana legislation to conflict with Kentucky legislation, that Indiana should pass a law licensing seining. It is submitted that this is not true. It is fundamental that fishing by any means whatsoever is legal until the State forbids, under its police power, certain methods of fishing. (Cyc. Article on Fisheries.) This being true, Indiana has, by its law above mentioned, stated that methods of fishing, illegal on other waters of her

confines, are legal when done on the River Ohio. Indiana thus has clearly indicated by its legislation that it meant that seining should be legal on the River Ohio. That Indiana had this thought in mind is demonstrated by the clause appearing at the end of the law herein mentioned which provides that even in the Ohio River it shall be illegal to seine within one hundred yards of the mouth of any stream emptying into that river from the Indiana shore. It is submitted, therefore, that Indiana has legislated with regard to fishing in the Ohio River and has thus assumed legislative jurisdiction over that stream.

By its Act of 1916 here involved, however, Kentucky has undertaken to regulate fishing in the Ohio River in a manner not concurred in by Indiana. Does this failure of concurrence on the part of Indiana render Section 2 of the 1916 Kentucky Act invalid?

In order to arrive at the correct solution of our problem, it is necessary to determine first what matters are included in the words "use and navigation" and "jurisdiction on the river," appearing in the Seventh Clause of the Virginia Compact, and secondly, what meaning is to be given to the word "concurrent" in that clause.

Approaching the question first on an historical basis, we know, of course, that at the time Kentucky was erected into a State, railroads were unknown, highways were not numerous and were difficult to be traveled, and that the free use and navigation of the great rivers were matters of vital importance to the

people. The free use and navigation of the Mississippi River had agitated Kentuckians and Virginians long before Virginia had ever ceded the Northwest Territory to the Confederation.

The treaty of peace concluded at Paris in 1763 between France, Spain and Great Britain, secured to British subjects the free navigation of the Mississippi from its source to the sea. By the treaty of Paris, 1783, Florida was retroceded by Great Britain to Spain, which also at that time owned Louisiana. In this treaty the right to the free use and navigation of the Mississippi was again secured to the citizens of the United States, whose independence was acknowledged by that treaty. Spain, however, later resisted this right, and it will be recalled how, even as late as 1795, it was rumored that the people of Kentucky were about to throw off their allegiance to the Union and join in with Spain in order to secure the right of deposit at New Orleans and to secure the free use of the Mississippi River. Virginia had in 1784 ceded her Northwest Territory on the condition that States were to be erected out of it. Virginia knew that she owned the Ohio River to the low water mark of its Northern and Northwestern shore. Virginia knew from the history of the Mississippi of whose system the Ohio formed a part, that we have thus hastily sketched, the vital need of requiring the owner of the river to keep it open and free for the common use and navigation of those who had to use or navigate it. Virginia knew that the Confedera-

tion as it existed at the time she passed her first enabling act (1785), which later became the Virginia Compact, was weak and almost ready to break up—indeed it was Virginia and Maryland that but two years later organized the convention out of which grew the one that created our Federal Constitution. Virginia knew the temptation of the owner of interstate streams to obstruct their free use and navigation, for obstruction to interstate commerce, largely carried on by means of interstate streams at that time, was the great impelling force which brought the thirteen States together in 1787 to create our Federal Constitution. Virginia had herself on March 28, 1785, entered into a compart with Maryland providing that all laws regulating fishing in the Potomac River should be concurred in by both States before they should be of any validity. (*Ex parte* Marsh, 57 Fed. 719.) Virginia undoubtedly knew that in 1783 New Jersey and Pennsylvania had entered into a compact for "concurrent jurisdiction" over the Delaware River (which has been held to include the power to legislate—President v. Trenton City Bridge Co., 13 N. J. Equity, 46). Virginia undoubtedly knew that under the law of Nations (Vattell Droit des Gens liv 1 Ch. 22, Sec. 266), where the middle of a river or stream is the boundary line between Nations, such Nations have the free use and navigation of the whole stream; that under the Roman law, navigable streams were considered public or common property and that public jurists applied this prin-

ciple of the Roman civil law to the same case between Nations. (Lawrence Wheaton's International Law, p. 347.) Virginia undoubtedly knew that jurisdiction, under the law of Nations, is distinct from sovereignty and that logically a State may extend its jurisdiction over acts committed beyond its territory, or, retaining its territorial sovereignty, grant jurisdiction over acts within its territory. (Holland's Jurisprudence, Ninth Edition, Chapter 18.)

The conclusion then is irresistible that Virginia did, by this grant of common use and navigation and concurrent jurisdiction found in the Seventh Clause of the compact, intend to give to those States which she stipulated should be erected out of the Northwest Territory she had ceded to the United States and which were as much her daughters as Kentucky, as much right and power over, on and in the Ohio River as she gave to Kentucky and to forever put it out of the power of Kentucky to adopt harsh and restrictive measures over the Ohio to the detriment of the other States which bordered on that stream, unless fully concurred in by those States. Virginia had seen the evil of a contrary policy, which, at the time she was passing the "Virginia Compact," was working its force to break up the Confederation of the thirteen States.

This historical resume is admirably expressed by Mr. Justice Hobson in his dissenting opinion in the case of Meyler v. Wedding, 107 Ky. 691, at 694:

"The great old Commonwealth that had given an empire to the Federal Government and furnished it a large part of the talent that shaped its early history, had no such narrow purpose in view. These far-seeing men intended the Ohio River to be the boundary between the States bordering upon it, and to be a common highway for all the States. They foresaw that the territory thus ceded would one day be a center of population and that the great river would be dotted with towns and cities, and a great thoroughfare of commerce. At common law the respective jurisdictions on either side of a highway were concurrent on it. This rule, which the experience of ages has confirmed as necessary to secure peace and protect life and property among their ancestors, was well known to the people of Virginia; and the great statesmen who controlled her affairs intended to establish the same rule for the highway which had hitherto been exclusively within the jurisdiction of Virginia. *Had it been intended by Virginia to retain her jurisdiction as it then stood, there was no need to mention in the act that part of the river which it left within her territory. And if it had been intended to confer upon Kentucky exclusive jurisdiction to low water mark on the northern shore, there was no need to mention the States possessing the opposite shores, for this jurisdiction would have passed with the grant of the soil.*

"The restriction of the concurrent jurisdiction to the States possessing the opposite shores is of necessity a grant of concurrent jurisdiction to both of them, for the exclusion of all others is by necessary implication an inclusion of these States. It can not fairly give one of them an exclusive jurisdiction. The purpose of the act was to enable the States on both banks

to protect their people from the evil-minded on the river, which was made a common highway for everybody. The natural meaning of the words is that 'the respective jurisdictions' of Virginia on the river as they then existed should continue in Virginia and Kentucky and be exercised by them concurrently with the States possessing the opposite shores. The clause in question is, by the express terms of the act, made a condition of the grant of the territory to Kentucky. *By plain terms, the respective jurisdictions of Virginia and Kentucky on the river are placed on the same footing as the respective jurisdictions of the States opposite them.*

"The three acts passed by the Virginia Legislature on the subject should be read together, and in construing them we should bear in mind the situation, at the time. The title to the Ohio River was in Virginia. There was no one to dispute her right. Having the whole title and the power to dispose of it, she enacted these statutes, having in view that which would best promote the settlement and prosperity of the vast area that was then dependent on the Ohio River as its only outlet. Her intention was not only to guarantee to the people of the States possessing the opposite shores the free use of this great waterway, then so essential to them, but to clothe these States with power to protect persons on the river in life, liberty and property. Otherwise, the use and navigation of the river might be substantially destroyed and become a menace to society on either shore."

But we are not confined merely to an investigation of the historical setting of the Virginia Compact in determining the meaning to be given the words "jurisdiction on the river," appearing in the Seventh

Clause, for this matter has been before the courts a number of times. In the case of Arnold v. Shields, 5 Dana, 18, at 22, Chief Justice Robertson, as early as 1837, stated the view of the Court of Appeals of Kentucky on this question to be:

> "Jurisdiction unqualified, being as it is the sovereign authority to make, decide on and execute laws, a concurrence of jurisdiction therefore must entitle Indiana to as much power, legislative, judicial and executive as that possessed by Kentucky over so much of the Ohio River as flows between them."

While it is true the views here expressed were not necessary to the actual decision of the case then before the court, yet coming so early in our history as that date and from so distinguished a judge as wrote the opinion, they are entitled to great weight as indicating what contemporaneous construction was put on these words "jurisdiction over the stream" by the Kentucky Courts.

In McFall v. Commonwealth, 2 Metc. 394, at 398 (1859), the Kentucky Court, speaking through Judge Duvall, again said:

> "The word 'jurisdiction' as applied to a State and as used in the compact with Virginia, imports nothing more than the power to govern by legislation."

That this power of legislation includes the power to regulate fishing was stated in the next case coming before the Kentucky Court, it being the case of

Meyler v. Wedding, 107 Ky. 310. In this case the facts were these. Wedding had secured a default judgment in an Indiana Court by virtue of process served on Meyler while he was on a boat on the Ohio River where it forms the boundary line between Indiana and Kentucky and on the Kentucky side of the Indiana low water mark. A suit was brought in Kentucky to enforce this judgment and the question was as to the validity of the service of process in the Indiana suit, which in turn depended on the effect to be given the words "concurrent jurisdiction" in this Seventh Clause of the Virginia Compact. The Kentucky Court held that the word "jurisdiction" in the Seventh Clause did not cover jurisdiction for the service of process. On this point this court held that the Kentucky Court erred. (192 U. S. 573.) In discussing the case, however, the Kentucky Court, at page 320 of its opinion, said:

> "There are numerous cases where the question of concurrent jurisdiction as applied to rivers forming a boundary line between the States has arisen and in these cases it has been almost universally held that the provisions in the several compacts and acts mean legislative jurisdiction."

And at pages 323-4:

> "We are of opinion clearly that concurrent jurisdiction as granted by the compact with Virginia meant only that the States should have legislative jurisdiction * * *. In other words, concurrent jurisdiction was given and retained

> * * * so that each State could grant ferry privileges and wharfing privileges *and regulate fishing therein* and such other rights common to both and necessary to be under a common supervision of both to make the waters of the River Ohio a common, public, free and unobstructed highway for the purposes of navigation."

So much of the view of the majority of the court was concurred in by Justice Hobson, who, however, dissented as above noted (107 Ky. 691) from the result reached by the court, on the grounds that the definition given by the majority of opinion was not inclusive enough and that in addition to the legislative powers included in the words "jurisdiction on the stream," there was also included the power of service of process. It was on this point alone that this court (192 U. S. 573) reversed the Kentucky Court. In the opinion of this case in this court, Mr. Justice Holmes, at page 584, said:

> "But jurisdiction, whatever else or more it may mean, is jurisdiction in its popular sense of authority to apply the law to the acts of men * * *. What the Virginia Compact most certainly conferred upon the States north of the Ohio, was the right to administer the law below low water mark on the river, and, as a part of that right, to serve process there with effect."

But that this court did not mean to hold that the Kentucky Court erred in construing the words "jurisdiction on the stream" to include the power to legislate, is quite apparent from the remaining portion of the opinion. On the contrary, it is submitted

that this court placed its seal of entire approval, by way of *dicta* it is true, on the reach of the decision of the Kentucky Court, *as far as it went,* for Mr. Justice Holmes continuing his views said:

> "What more 'jurisdiction' as used in the statute may embrace, or what law or laws properly would determine the civil or criminal effect of acts done upon the river, we have no occasion to decide in this case. But so far as applicable, we adopt the statement of Chief Justice Robertson in Arnold v. Shields, 5 Dana, 18, at 22, 'jurisdiction unqualified, being as it is the sovereign authority to make, decide on and execute laws, a concurrence of jurisdiction therefore must entitle Indiana to as much power, legislative, judicial and executive, as that possessed by Kentucky over so much of the Ohio River as flows between them.'"

So far as decisions covering cases arising over streams other than the Ohio are concerned, we find that Congress in the enabling act creating States bordering on division rivers and especially on the Mississippi and Columbia rivers, invariably provided that such States should have "concurrent jurisdiction on" these boundary streams. Numerous cases, as we will point out later on in this brief, have arisen over this phrase "concurrent jurisdiction." But it has universally been assumed where the question was involved that legislative powers and the regulation of fishing were included in the phrase "jurisdiction on the stream"; the question in each

case being as to the power of the State to pass the particular regulation in question.

Nielsen v. Oregon, 212 U. S. 315.
In re Mattson, 69 Fed. 535.
Ex parte Despeiro, 152 Fed. 1004.
State v. Moyers, 136 N. W. 896 (Iowa).
Columbia River Packers Assn. v. McGowan, 172 Fed. 991.

It is urged, however, by the defendant in error that the words "jurisdiction on the river" excludes the right to regulate fishing, as that is under or in the river. In urging this contention the defendant in error ignores all the authorities just noted, ignores the statement of the Kentucky Court in Wedding v. Meyler, 107 Ky. 324, and seizes on the remarks of Mr. Justice Holmes towards the end of his opinion in the Wedding v. Meyler case, 192 U. S. 573. However, to get the true meaning of the remarks of the Justice, the whole quotation should be given. It is,

> "To avoid misunderstanding, it may be well to add that the concurrent jurisdiction given is jurisdiction *on* the river and does not extend to permanent structures attached to the river bed and within the boundary of one or the other States. Therefore, such cases as Mississippi, etc., Co. v. Ward, 2 Black, 485, State v. Mullon, 35 Iowa, 199, do not apply."

Thus it is apparent that Mr. Justice Holmes was distinguishing those cases of ferry privileges and permanent structures, such as bridges, dams and even oyster beds and analogous objects attached to

the river bed and within the boundary of one or the other State, in which character of cases it is the law that the phrase "concurrent jurisdiction" on the stream contained in compacts and enabling acts have nothing to do.

McGowan v. Columbia River Packers Assn.—Adv. Sheets, U. S. Sup. Ct.—Decided December 17, 1917.
Gilbert v. Moline Water Power & Mfg. Co., 19 Iowa, 399.
Garner case, 3 Gratt (Va.), 654.
McCready v. Virginia, 94 U. S. 391.
Mississippi, etc., Co. v. Ward, 2 Black, 485.
State v. Mullen, 35 Iowa, 199.
Keator Lumber Co. v. St. Croix Boom Co., 76 Wis. 62.
Smith v. Maryland, 18 How. 74.
State v. Faudre, 54 W. Va. 122.

It will be seen then, that from the authorities above cited, "jurisdiction on the stream" has solely to do with floating objects in or on the stream, whether the objects be animate or inanimate, human or otherwise. In each case of these compacts between States or enabling acts of Congress where the phrase "jurisdiction on the river" appears, it has universally been held to apply to objects in as well as on the stream, provided they are not permanent structures or attached to the bed of the stream and have been held to include the regulation of fishing.

Wharton v. Wise, 153 U. S. 155, relied on by defendant in error, announces no contrary doctrine. That case turned on the interpretation to be given

to the compact entered into by Virginia and Maryland in 1785 with reference to fishing rights in the River Pocomoke. This river was always entirely within the boundaries of Virginia and in her compact with Maryland, absolutely nothing was said about fishing privileges, expressly or by implication, with regard to this stream although fishing rights were granted Maryland with regard to the Potomac River. Hence the decision of this court in that case does not militate against the views here urged.

Furthermore the contemporaneous construction placed upon this Seventh Clause of the Virginia Compact by the various States bordering upon the Ohio River confirms the belief that it was meant to and did confer upon such States concurrent legislative powers.

We have seen how Kentucky by its courts from 1837 (Arnold v. Shields, 5 Dana. 22), through 1859 (McFall v. Commonwealth, 2 Metcalfe, 398), down to as late as 1899 (Meyler v. Wedding, 107 Ky. 310), consistently thought that the Seventh Clause carried a grant of legislative powers to all the States bordering on the Ohio which included the right to regulate fishing. Indiana has always claimed such powers under the compact (present Constitution of Indiana, Section 222—Constitution of Indiana of 1851—Sherlock v. Alling, 44 Ind. 184; Dugan v. State, 125 Indiana, 130). Indeed that Indiana has always so construed the said compact is admitted by the defendant in error. In the petition (Record, p. 4) it is so

alleged, and this being a matter of law foreign to Kentucky and so one of fact, the demurrer of defendant in error admitted its truth. By its Constitution of 1848 Illinois claimed such power. West Virginia seems to have conceded it. (State v. Plants, 25 W. Va. 119, State v. Faudre, 54 W. Va. 122.)

Lastly, a study of the Seventh Clause of the Virginia Compact itself leads to the same conclusion at which the authorities hereinbefore quoted have arrived. This clause first starts out with the proposition that the use as well as the navigation of the Ohio is to be free and common to all the citizens of the United States. The use of the river is more inclusive than the right of navigation. It was obviously intended to cover the right to make such use of the stream as International law at that time allowed of boundary streams. As remarked hereinbefore, International law had at the time the Virginia Compact was enacted, adopted the view of the Roman law, to the effect that such streams were common and public property. (Lawrence Wheaton on International Law, page 347.) Hence it follows that the use of the stream included and includes the right to take water from the river, to fish therein and the like. This effectually disposes of the suggestion of the defendant in error that Kentucky, owning the Ohio River to its low water mark on the Indiana shore, thereby owns the fish in that stream. Whether this be true or not, is not profitable to discuss here. Conceding that she so does, Kentucky owns the fish as trustee

for some one and that one is fixed by the Seventh Clause of the compact as the Citizens of the United States. Immediately coupled by the conjunction "and" to this grant of the free use and navigation of the stream is the grant of concurrent jurisdiction on the river to the States bordering upon it. Under the common rules of statutory construction, the latter part of the clause, joined as it is by the conjunction "and" to the former part, should be read and construed with and in the light of such former part. It therefore follows that the grant of jurisdiction given in the latter part of the clause covers such jurisdiction, legislative, judicial and executive, as is necessary to enjoy the free use and navigation of the stream. In other words, the grant conveys legislative powers to protect and enjoy this free use and right of navigation; and fishing being one of the rights of free use, the regulation of fishing is therefore included in such grant of legislative powers.

It is therefore respectfully submitted that under the plain reading of the Seventh Clause of the Virginia Compact itself, under the contemporaneous construction placed upon it by the various States affected by it, under the facts of history as they were during the time the Virginia Compact ripened into law, under the decisions of the Kentucky Court and of this court, the right to legislate over the Ohio River was by this Seventh Clause of the Virginia Compact granted to the various States bordering up-

on that stream and that one of the objects of this power to legislate was the regulation of fishing.

Having thus arrived at what we submit to be the meaning of the word "jurisdiction" in this Seventh Clause of the Virginia Compact, we are now confronted by the question of the meaning to be given the word "concurrent" in that clause.

In examining compacts entered into prior to the date of our Federal Constitution by States which bordered on dividing rivers such as the Delaware and Potomac, and in examining enabling acts passed by Congress since 1789 creating States also bordering upon dividing rivers such as the Mississippi and Columbia, we find many instances of where "concurrent" jurisdiction over such dividing streams, has been provided for. In a note discussing the case of Nielsen v. Oregon, 212 U. S. 315, to be found in 22 Harvard Law Review, 599, the author well says "there are four possible conditions and interpretations to be given this phrase "concurrent jurisdiction":

> "First. That before jurisdiction is exercised, both States must agree.
>
> "Second. That one State can exercise jurisdiction within the other's territory so long as the other has not acted adversely.
>
> "Third. That conflicting legislative enactments may exist, but the first State obtaining actual custody over the party or parties in question, shall defeat the right of the other State to exercise its power.

> "Fourth. That a conflict of legislative, executive or judicial decrees must be settled, if at all, by agreement between the conflicting jurisdictions after jurisdiction has been exercised."

Authorities can be found to sustain each of these four views. The third one, now, under the doctrine of Nielsen v. Oregon, 212 U. S. 315, no longer the law as we shall soon point out, has probably the largest number of authorities to sustain it. Among these are the cases from Kentucky of Lemore v. Commonwealth, 127 Ky. 480, and Church v. Chambers, 3 Dana. 274. In the Lemore case, the Kentucky Court held that where A. landed on the Kentucky shore of the Mississippi River, took B. on board his boat, conveyed B. to the Missouri side of the middle of that stream, and then delivered to him a quart of whiskey, after which he reconveyed B. back to the Kentucky shore, A. could be punished for a violation of the Kentucky local option laws, even though such sale was legal under the Missouri law. In so far as this decision is rested by the court, as it was, on the ground that the sale having been begun in Kentucky would be considered to have been completed there, we can not take issue with it. But the decision also went off on the ground that Kentucky could punish the offense complained of although committed on the Missouri side of the river under the grant of "concurrent jurisdiction" given it by Congress over the Mississippi River, although the act done by A. on that side was not illegal under

the Missouri law. Exactly like the foregoing case in principle are the cases of State v. Cunningham, 102 Miss. 237; Welsh v. State, 126 Ind. 71; State v. Moyers, 155 Iowa, 678; Church v. Chambers, 3 Dana, 279; Sanders v. St. Louis, 97 Mo. 26; Sherlock v. Alling, 44 Ind. 184, and Memphis, etc., v. Pirkey, 142 Ind. 304.

The court below in its opinion and the defendant in error have cited other cases which they claim likewise support this third and their view. An analysis of such cases, however, demonstrates the error of their claim. In the cases of Dugan v. State, 125 Ind. 130; State v. Faudre, 54 W. Va. 122; McFarland v. McKnight, 6 B. Mon. 500, and Harrel v. Speed, 113 Tenn. 224, the courts sustained the application of the *lex fori* to acts begun or begun and completed wholly upon the land of the State of the forum. No question was presented as to the application of the *lex fori* to acts done upon dividing streams. The cases of Strater v. Foree, 2 B. Mon. 123, and Little v. Green, 123 N. W. 367 (Iowa), are absolutely not in point, the former case dealing entirely with the question whether or not a Kentucky Statute permitted an *ex parte* proceeding *in rem* against a boat navigating the Ohio River, which, being a question of "Remedy" was plainly to be decided by the *lex fori;* and the latter case holding that Roughing Slough where the fishing complained of had taken place was not a part of the Mississippi and so no question of "concurrent jurisdiction" was

presented. In McFall v. Com., 2 Mete. 394 (Ky.), it does not appear that Ohio had ever legislated with regard to the Ohio River and secondly, it can hardly be contended that the solemnization of marriages is included in the grant of the "use and navigation of and concurrent jurisdiction over the Ohio River."

The foregoing line of authorities which sustain the third view of the phrase "concurrent jurisdiction" as outlined heretofore, are well and accurately summed up and used as bulwarks for the decision of the Oregon Supreme Court in the case of Nielsen v. Oregon, 95 Pac. 720 (Oregon). This case, however, was reversed by this court—Nielsen v. Oregon, 212 U. S. 315—and in so doing, we submit that this court has reduced the four views of "concurrent jurisdiction" above outlined to but two and in such process has entirely eliminated the third view relied upon by the defendant in error.

In the Nielsen case decided in 1909, the facts were these. Oregon had a law which forbade fishing with a seine in the Columbia River. Washington had no such law. The two States bounded on the Columbia River, each owning to the middle of that stream, and in their enabling acts, Congress provided that they should have "concurrent jurisdiction" on the Columbia River. Under its law forbidding fishing with a seine, Oregon undertook to punish Nielsen for so fishing on the Washington side of the Columbia River. The Oregon Court, adopting the third view of "concurrent jurisdiction" above outlined, sus-

tained the conviction. This court, however, in reversing the case held that Oregon, under the grant of "concurrent jurisdiction" over the Columbia River, was without power to punish under its laws an act committed on the Washington side of the stream so long as such law had not been concurred in by the State of Washington.

Under the Nielsen case as here decided it is now the law that under the grant of "concurrent jurisdiction," no State can punish a person for doing something in a place where another State has a right of regulation without the latter's consent. If Oregon could not punish an act done in conformity with the laws of Washington on the latter's side of the Columbia River, so is Kentucky without power to punish an act done in conformity with the Missouri law on the latter's side of the Mississippi (Lemore v. Commonwealth case, *supra*) and so is Mississippi without power to punish an act done in conformity with Arkansas law on the latter's side of the Mississippi River. (State v. Cunningham, *supra.*)

The question then remains, which view of these two left shall this court adopt. Shall we say that before jurisdiction is exercised, both States must agree, or shall we say that one State can exercise jurisdiction within the other's territory so long as the other has not acted adversely? We are materially assisted in our determination of these questions by the fact, that, as we pointed out in the earlier part of this brief, Indiana has already legislated with regard

to fishing privileges in the Ohio River and that this legislation on her part was practically identical with that of Kentucky prior to the Act of 1916 here in question. This action on the part of Indiana thus reduces the two remaining views to one—the first. That this first view is sound and the proper one to adopt in the case at bar, is demonstrated, we submit, by reason and the authorities.

Before entering into the argument supporting this proposition, we may well note some objections urged by the lower court and the defendant in error, as to its soundness.

The lower court, in discussing the matter now before us, said (Record, pp. 38, 39):

> "To say that the jurisdiction is joint, thereby requiring the joint action of the two States * * * would require the two States to make an agreement or compact * * * expressly forbidden by Section 10 of Article 1 of the Federal Constitution."

This point has been expressly ruled upon by this court and held not tenable. In the case of Wharton v. Wise, 153 U. S. 155, this court considered this point in relation to the compact between Virginia and Maryland then in question and said:

> "The validity of the compact of 1785 has been questioned as in conflict with the second clause of the sixth article of the Confederation, which provided that no two or more States should enter into any treaty, confederation, or alliance whatever between them without the consent of the

United States in Congress assembled, specifying accurately the purposes for which the same was to be entered into, and how long it should continue; and also as having been superseded by the Constitution of the United States subsequently adopted. A few words upon each of these positions. The articles inhibiting any treaty, confederation, or alliance between the States without the consent of Congress were intended to prevent any union of two or more States, having a tendency to break up or weaken the league between the whole; they were not designed to prevent arrangements between adjoining States to facilitate the free intercourse of their citizens, or remove barriers to their peace and prosperity; and whatever their effect, such arrangements could not be the subject of complaint by the States making them until, at least, the Congress of the Confederation interposed objections to their adoption or enforcement, which was never done. * * *

"In determining the effect of the prohibition of the clause in the sixth article of the confederation upon the validity of the compact, the observations of this court, in the recent decision of the controversy between Virginia and Tennessee, upon the meaning of the clause of the Constitution of the United States which is similar, in one particular, with that in the Articles of Confederation, and broader in another, may be properly considered. * * * In the case mentioned there was an agreement between the States of Virginia and Tennessee to appoint commissioners to run and mark the boundary between them, made without the consent of Congress, and the question considered was whether the agreement was within the prohibition of the clause cited from the Constitution of the United States, and we said: 'The terms "agreement" or "com-

pact," taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.

" 'There are many matters upon which different States may agree that can in no respect concern the United States. * * * If, then, the terms "compact" or "agreement" in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?

" 'We can only reply by looking at the object of the constitutional provision, and construing the terms "agreement" and "compact" by reference to it. * * *

" 'Looking at the clause in which the terms "compact" or "agreement" appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States which may encroach upon or interfere with the just supremacy of the United States. * * *'

"So, in the present case, looking at the object evidently intended by the prohibition of the Articles of Confederation, we are clear they were not directed against agreements of the character expressed by the compact under consideration. Its execution could in no respect encroach upon or weaken the general authority of Congress

under those articles. Various compacts were entered into between Pennsylvania and New Jersey and between Pennsylvania and Virginia, during the Confederation, in reference to boundaries between them, and to rights of fishery in their waters, and to titles to land in their respective States, without the consent of Congress, which indicated that such consent was not deemed essential to their validity.

"In our judgment the compact of 1785 was not prohibited by the Articles of Confederation."

Furthermore the cases of Covington & Cincinnati Bridge Company v. Commonwealth of Kentucky, 154 U. S. 204, and Broadway and Newport Bridge Company v. Com., 173 Ky. 165, by way of *dicta,* authorize the view that Kentucky and Ohio by "reciprocal legislation" can in the absence of Congressional action fix the rate of toll on bridges spanning the Ohio, thus showing that concurrent or reciprocal legislation is not *per se* unconstitutional.

Secondly we should eliminate, as pointed out by this court in Wedding v. Meyler, 192 U. S. 573, and in the very late case of McGowan v. Columbia River Packer's Assn., U. S. Adv. Sheets—Decided December 17, 1917, that class of cases dealing with permanent structures such as dams, bridges, oyster beds and the like attached to the bed of the stream. (Keator Lumber Co. v. St. Croix Boom Corporation, 38 N. W. 529 Wis.; Roberts v. Fullerton, 117 Wis. 235; State v. Mullen, 35 Iowa, 199.)

In the Wedding case, this court said, "Concurrent jurisdiction * * * does not extend to permanent structures attached to the river bed and within the boundary of one or the other State."

Having thus disposed of the objections of the lower court and the defendant in error, as above noted, to our views, we now take up the argument in their support.

Webster defines the word "concurrent" as "occurring or acting together, meeting at the same point." In the case of Allen v. Moore, 173 Ky. 394, the Court of Appeals of Kentucky adopted the definition of "concurrent jurisdiction" as given in words and phrases Vol. 2, p. 1391: "Equal jurisdiction; having the same jurisdiction; authorized to deal with the same subject matter; equal power and authority." These definitions would require that under the "concurrent jurisdiction" clause both States should agree on legislation concerning the subject-matter of such jurisdiction. This is especially sensible where fishing rights are involved. Would it not be indeed foolish for one State bordering on a stream and owning to the middle of it to pass laws regulating fishing which are not concurred in by the State on the opposite shore? Laws regulating fishing passed only by one State and having effect only to the middle of the stream would be of absolutely no avail if the State on the opposite shore could pass different laws and in conflict with those passed by the first mentioned State.

The solution of the problem which we advocate, has received the sanction of the courts. In the case of *In re* Mattson, 69 Fed. 535, the facts were these: Mattson was convicted in the Circuit Court of the State of Oregon for fishing on Sunday in the Columbia River on the Washington side of the stream. Under the law of Oregon it was unlawful to fish in the Columbia River on Sunday, but Washington had not concurred in this law. A writ of *habeas corpus* was brought in the Federal Court and the prisoner discharged on the grounds that under the concurrent jurisdiction grant to these two States contained in the enabling acts, it was necessary that both States should concur in any law regulating the subject of fishing on the River Columbia. This case exhaustively considers the various cases construing the words "concurrent jurisdiction." The court said at page 537:

> "Concurrent jurisdiction is a practical necessity in the administration of government over such rivers. Its existence does not deprive a new State of the dominion and sovereignty belonging to the original States. The admission of Washington subject to the exercise of a concurrent jurisdiction with Oregon over the Columbia River does not place her upon an unequal footing with the other States. On the contrary, this is the footing on which the other States most favored in this respect are placed. It is immaterial that some of the original States made such condition of jurisdiction for themselves, and that others impressed it upon the territory ceded by them. The objection relates to the fact of

equality, and not to the authority by which such equality is established. * * *

"Whether, in legal effect, the boundary of each State is limited by its own shore, or by the middle channel, with concurrent jurisdiction over the river in either case, the result is the same. To say that Congress may establish a concurrent jurisdiction in the one case, but not in the other, is to perplex a grave question with a mere subtlety."

And again on page 542:

"The word 'concurrent' in its legal and generally accepted definition, means acting in conjunction, and when applied to the jurisdiction of Oregon to enact penal laws for the Columbia River it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the State of Washington, or as are already in force within its jurisdiction. No comparison can be made between a case like this and cases where the concurrent jurisdiction has been invoked to punish acts that are crimes in themselves, or that are made so by the laws of both States having such jurisdiction. The two States own the bed of the Columbia River upon their respective sides to the middle channel, and the citizens of each within such boundary have a common right of fishing, so long as the navigation of the river is not obstructed. This right is held by the Supreme Court of the United States to be, not a mere privilege or immunity of citizenship, but a right of citizenship and property combined, which the State may make exclusive in its own citizens. McCready v. Virginia, 94 U. S. 391. It is clear, therefore, that this right in each State is not subject to control or regulation by the other, unless there is mutual agree-

> ment to that end. It can no more be brought within such control than can the enjoyment of property rights on the dry land."

In the case of *Ex parte* Despeiro, 152 Fed. 1004, the facts were these: D. was convicted in the State of Oregon under a law forbidding the use of a seine in fishing in the Columbia River. The facts were that D. had fished on both the Oregon and Washington side of that stream and he was convicted on two charges for such offenses. Washington had no such law forbidding the use of a seine. On a petition for writ of *habeas corpus*, the Federal Court discharged the petitioner and held that, under the concurrent jurisdiction clause of the enabling acts of these two States, for any regulation of fishing passed by either State applying to any part of the river, whether to the side of the State that passed the law or to the other side, to have any validity, it must be concurred in by the State on the opposite shore. At page 1007 of the opinion the court said:

> "It is the act of concurrence between the two States in the exercise of legislative authority that validates the act and gives it the force of law and unless there is a concurrence or assent by both States to the enactment, it can not have that force."

In the case of President v. Trenton City Bridge Co., 13 N. J. Equity, 46, the New Jersey Court, construing the compact between New Jersey and Pennsylvania providing for concurrent jurisdiction on the

Delaware River between those two States, held that the phrase "concurrent jurisdiction" required concurrent action or concurrence of agreement.

In the case of Arnold v. Shields, 5 Dana, 16, at 22, Chief Justice Robertson in commenting on the concurrent jurisdiction phrase contained within this Seventh Clause of the Virginia Compact, after stating that Indiana under such clause had as much power, legislative, judicial and executive, as that possessed by Kentucky over so much of the Ohio River as flows between them, went on to say:

> "Neither of them can consistently with the compact exercise any authority over their common river so as to destroy or impair or obstruct the concurrent rights of the other."

Counsel for defendant in error insists, however, that the Nielsen case is diametrically opposed to the doctrine we advance. We do not so interpret it. The principle of the Nielsen case, as we read it, is to the effect that a State can not pass a valid regulation to apply to that part of a dividing stream over which another State has a power of regulation without the latter's consent. Questions of territorial limits are not fundamental to the decision. Jurisdiction is distinct from sovereignty and a State may share jurisdiction over acts beyond its territory, or, retaining its territorial sovereignty, grant jurisdiction over acts within its territory. (Holland's Jurisprudence, 9th Ed., Chapter 18.) The fundamental point in the Nielsen case is the "power of regulation." If a

State has such power, a bordering State, under the grant of concurrent jurisdiction is powerless to affect it without the former's concurrence and consent. Such, we submit, is the true principle of the Nielsen case. As so interpreted, the Nielsen case is particularly applicable to the case at bar. Indiana has no territorial sovereignty over the Ohio River save from the low water mark on the Indiana shore. But it has "concurrent jurisdiction" over the whole stream. Within the limits of the subject-matter of concurrent jurisdiction (discussed in the first part of this brief) Kentucky is powerless to affect this power of Indiana as is Indiana powerless to affect the like power of Kentucky. The only practical solution and one consistent with reason and the authorities cited is to adopt the view we advocate of agreement by the States concerning the exercise of this power of theirs. If Kentucky can, without the concurrence of Indiana, enact any law it sees fit concerning the subject-matter of this "concurrent jurisdiction," such power on the part of Kentucky can render utterly null and void the grant of jurisdiction given to Indiana. Such a result was never contemplated by the framers of the Virginia Compact and is not consonant with reason.

It is therefore respectfully submitted that under the authorities we have quoted, under the dicta of Chief Justice Robertson, in the Kentucky case of Arnold v. Shields, under the dictionary meaning of the word "concurrent" and under the peculiar facts

of the case at bar arising out of the circumstance that Indiana owns no portion of the Ohio River except to the Indiana low water mark, the view first advanced is the correct solution of our problem and that in order for a law passed by Kentucky regulating the methods of fishing in the Ohio River to be valid, it must be concurred in by the State of Indiana.

Some suggestion is made that a host of imaginary ills would follow in the train of the adoption of this view. We must first remember that the concurrent jurisdiction granted by the Seventh Clause of the Virginia Compact has some restrictions. Just what they are it would not be profitable at this point to attempt to define. But it may be said, at least in a general way, that the concurrent jurisdiction clause is confined to objects, animate or inanimate, floating on or in the river. So far as permanent structures and the like are concerned and quarantine laws, the States reserve all their inate powers. Furthermore, in the two large classes of crimes, *malum in se* and *malum prohibitum,* it is a matter of common knowledge that those falling in the class *malum in se* are the same in all our common law States. So far as the *malum prohibitum* class is concerned, we know that the general thought and sentiment of this country, at least in States so close together as the boundary States on the Ohio River, are fairly uniform. The few cases where they are different are not so material and even where material, it is something that can not be helped, since that was a matter to have

been considered by those who made the Virginia Compact and not by us.

It is therefore respectfully submitted that under the clause granting concurrent jurisdiction on the River Ohio to the States of Indiana and Kentucky, the power to regulate fishing by legislation passed to both States and for any regulation of fishing, which is a common law right subject only to the police power, to be valid, it must be agreed to or concurred in by both States, and that since Section 2 of Chapter 29 of the Acts of 1916 has not been agreed to by Indiana, who continues to stand by her legislation, which, prior to that act, did concur with the Kentucky legislation, Indiana's position renders this 1916 Act invalid, as being in conflict with the Virginia Compact and so impairing the obligation of contract.

II. IS SECTION 2 OF CHAPTER 29 OF THE ACTS OF 1916 IN CONFLICT WITH THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

We shall not take up much of the court's time on this point. It was suggested by the court of first instance on oral argument before it that the court might construe the concurrent jurisdiction clause of the compact with Virginia to give to Indiana and Kentucky each the right to regulate the acts of its own citizens, and that therefore Kentucky had a right to pass this 1916 act in so far as its own citizens were

concerned, and that Indiana could pass what fishing laws it pleased so far is its citizens were concerned. We frankly state that we do not think any such interpretation has been or can be given to that clause in the Virginia Compact, nor has it been heretofore urged by the defendant in error. But if it should be urged, then we think the result arrived at would be plainly in violation of the Fourteenth Amendment of the Constitution of the United States, and for these reasons:

First: As hereinbefore stated, the right of fishing as one pleases and by the method one wishes is a property right, subject, of course, to the control of the police power of the State which has jurisdiction. (McCready v. Virginia, 94 U. S. 391.)

Second: In order for a State to make a valid exercise of its police power over property rights, the exercise of that police power must have some effective relation to the object to be obtained and if such law has no such effective relation, then it is not a proper exercise of the police power.

Third: Of course, the object to be obtained by these laws regulating the method of fishing is to conserve the fish supply.

Fourth: If Indiana, despite Kentucky's laws forbidding Kentucky citizens to fish with a seine in the Ohio River, has a right to permit Indiana citizens to so fish, then the fact that Kentucky has such a law would really not protect the fish in that stream, for all who made their living by fishing would simply

become Indiana citizens and continue the same methods denounced by the Kentucky law but allowed by the Indiana law. Therefore, Kentucky could not obtain the end sought, and therefore the Act of 1916 would not be a proper exercise of the police power.

Fifth: If the Act is not a proper exercise of the police power, then the right of fishing being a property right and protected by the Fourteenth Amendment, the Act of 1916 is invalid.

CONCLUSION.

For the reasons heretofore adduced and under the authorities cited in support thereof, it is respectfully submitted that the Act of 1916 here in question is unconstitutional. If this be true, then the judgment of the court below should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 965. 3[redacted]113

FRANK NICOULIN, PLAINTIFF IN ERROR,

versus

JOHN J. O'BRIEN, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR AND KENTUCKY GAME AND FISH COMMISSION, AMICUS CURIAE.

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Attorney for Defendant in Error and Kentucky Game & Fish Commission, Amicus Curiae.

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	Church v. Chambers, 3 Dana. 279.
	McFarland v. McKnight, 6 B. Mon. 510.
	McFall v. Com., 2 Metcalfe 394.
	Lemore v. Com., 127 Kentucky, 480.

a. If Kentucky on the south and Indiana, Illinois and Ohio on the north fail to agree, the laws of all of them would be invalid, lawlessness on the river would result and the very object of the Compact with Virginia would be defeated.

b. If Illinois should assent to Kentucky's law prohibiting seining, and Indiana should not assent; and Ohio should enact a law allowing the use of seines providng the mesh of the seine is two and a half inches or more large and Kentucky should assent to it, the result would be:

A. In Kentucky counties opposite the river banks of Illinois seining in the river would be unlawful.

B. In Kentucky counties on the river opposite Indiana there would be no law governing seining.

C. In Kentucky counties on the river opposite Ohio the use of nets with a mesh of two and a half inches or more would be permissible.

The result would be that we would have three different laws regulating fishing in the Ohio River, operating in respective countes of Kentucky at the same time. This would be not only confusing and result in lawlessness, but would be directly in conflict with the Constitution of Kentucky, forbidding local legislation, and would result in defeating the object of the Virginia Compact.

9. As the matter now stands, each of the States involved, claims the right to legislate concerning crimes on the Ohio River opposite its shore, and to enforce its own legislation in its own courts without the assent of Kentucky and Kentucky is claiming the same rights without the assent of any of those States.

a. Crime on the Ohio River has been punished and rights adjudicated according to the laws of the State obtaining jurisdiction of the parties. None of the States involved is complaining that its rights or jurisdiction is being invaded and the object of the Compact with Virginia is accomplished.

10. We see no reason why Kentucky Courts should hold Kentucky laws regulating rights and punishing crimes committed on borders belonging to it and within its *own* territorial boundary, impotent and ineffective because of the lack of consent of Indiana, Illinois and Ohio, when these States are passing similar laws without the assent of Kentucky and their respective courts are enforcing and upholding them.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 905.

FRANK NICOULIN, - - - *Plaintiff in Error,*

versus

JOHN J. O'BRIEN, - - - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR AND KENTUCKY GAME AND FISH COMMISSION, AMICUS CURIAE.

May it please the Court:

This action comes before You upon writ of error from the decision and judgment of the Court of Appeals of Kentucky, which affirmed the ruling of the Jefferson Circuit Court, in sustaining a demurrer to the petition filed by the plaintiff in error for a writ of prohibition against the defendant in error, and denying and dismissing said petition.

FACTS.

The petition sets forth that plaintiff in error was arrested for a violation of the statute of Kentucky prohibiting seining for fish in the waters of this State and was fined by defendant in error, who is a justice of the peace. Plaintiff in error admits that he was seining in the Ohio River south of the northern low-water mark, and admits that he is guilty of the acts charged in the warrant, but defends upon the ground that the statute under which he was so fined (Sections 1 and 2 of Chapter 29, Acts of Kentucky, 1916) is unconstitutional and invalid because it has never been concurred in by the States on the northern side of the Ohio River, and prays this court for a writ of prohibition against the defendant in error to enjoin the latter from undertaking to collect said fine.

The demurrers filed to said petition are based on the following questions:

1. That the act under which plaintiff in error was fined is not unconstitutional and is valid and enforceable, and therefore defendant in error was and is in the performance of his duties to impose said fine upon plaintiff in error and to collect the same, and, therefore, should not be prohibited from taking further action in regard thereto.

2. (Special Demurrer.) That plaintiff in error, being an individual and a citizen of Kentucky, has no right to defend upon the theory that the rights of another State are being infringed upon; that he is

not in a position to be heard upon the question, or to raise the issue for determination of the rights of a State, who is not complaining or raising the question and who is not a party to the proceedings, and will not be bound by any decision the court may render against it.

There is no disagreement of fact and the only question to be determined is a pure matter of law, and therefore we proceed to present to You more of a quotation and summary of authority than argument, deeming the opinions of courts to be of more importance and weight to Your Honors than the opinions and theories of counsel.

THE GENERAL DEMURRER.

The question here to be considered is whether the defense offered by plaintiff in error, *i. e.*, that to be enforceable the law must be concurred in by Indiana, is a good defense, and whether the law as it now stands is unconstitutional and invalid, as he claims.

The contention made by defendant in error, and concurred in by the Kentucky Game & Fish Commission, as a friend of the court's, is, of course, that Kentucky has the right to regulate the taking of fish in the Ohio River and pass any and all proper laws governing its territory, including the Ohio River to the boundary line, without asking the consent, approbation or acquiescence of any other State.

1.

The boundary of Kentucky is the low-water mark on the northern side of the Ohio River.

Upon the undertaking of the discussion of the questions involved in this argument, there is a great temptation to enter into a historical review of the facts and conditions which existed prior to and virtually led up to the creation of the State of Kentucky and of the States bordering upon the northern and northwestern shores of the Ohio River, but in the preparing of this brief we feel that, in view of the magnificent summaries contained in the opinions of the Court of Appeals and the Jefferson Circuit Court and opposing counsel's brief along these same lines, any attempt upon our part would appear to be but plagiarism and, in addition, would add nothing towards enabling Your Honors to arrive at any fuller understanding of the matter.

The first and basic fact to be kept in mind is that the Ohio River lies within the territorial limits of this Commonwealth. The situation between Indiana and Kentucky is not identical with the majority of States separated by a navigable stream; in a great many such cases each State owns to the middle of the river. Here is a different state of case; by ample construction and interpretation of the instrument by which the State of Virginia made out of part of its territory new States and Territories, among which was what is now Kentucky, the boundary line on the

north and northwest runs along the low-water mark on the north and northwest shore of the Ohio River.

This has been so decided by You in the case of Indiana v. Kentucky, in 136 U. S., page 1, wherein the following language is used:

> "The court said that the question whether the land lay within the State of Kentucky or Indiana depended chiefly upon the land law of Virginia and on the cession of that State to the United States, and reached the conclusion that the boundary between the States was at low-water mark on the northwest side of the river. * * * Our conclusion is that the waters of the Ohio River, when Kentucky became a State, flowed in a channel north of the tract known as Green River Island, and that the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled."

See also further decisions of the same court:

Meyler v. Wedding, 192 U. S. 573.
Hadley v. Anthony, 5 Wheat. 375.
Henderson Bridge Co. v. Henderson, 173 U. S. 592.

2.

The State owns navigable waters within its territorial limits and owns the lands under them and the fish therein.

This statement is a fundamental taken from ancient English jurisprudence; it has been followed down through the ages in the courts of Great Britain and the Colonies, and we find numerous decisions by our American courts which are merely declaratory of the common law to that effect.

In Wharton v. Wise, 153 U. S. 155, the court held:

> "The eighth clause provided that 'all laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine in the River Potowmack or for preserving and keeping open the channel and navigation thereof, or of the River Pocomoke, within the limits of Virginia, by preventing the throwing out ballast or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both States.' * * *
>
> "The appellant, a citizen of Maryland, is under a judgment of imprisonment for not paying a fine and costs of prosecution imposed for unlawfully catching and taking oysters in the waters of Virginia in violation of its laws. That State is the owner of the navigable waters within its limits and the lands under them, holding them in trust for the public, and authorized to pass all necessary laws for the protection of the fish therein, whether floating or shell, and the punishment of any citizens of its own or other States for taking them against its prohibitions."

It was further announced in Smith v. Maryland, 18 Howard, 74:

> "Whatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State, or sovereign power which governed its territory before the Declaration of Independence, but this soil is held by the State not only subject to, but in some sense in trust for the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell fish as floating fish. The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held."

This brings us naturally to the next proposition, which is almost as fundamental as the one here stated; as Kentucky's boundary runs to the Indiana side, it owns the river, the water in it, the bed under the water, and the fish in the river, and—

3.

As the fish are the property of Kentucky, held in trust for public use, it is within the police power of the State to pass laws regulating the taking of them, and tending to protect, conserve and propagate them.

The authorities sustaining this proposition are so numerous that it is impossible and unnecessary to quote from all of them. In Vol. 19 of Cyc., pages 986, 1006, 1008, 1012 and 1013, will be found a concise statement of the principle and an abundant reference to decisions supporting it.

> "It is well established that by reason of the State's control over fish and game within its limits, it is within the police power of the State Legislature, subject to constitutional restrictions, to enact such general or special laws as may be reasonably necessary for the protection and regulation of the public's right in such fish and game, even to the extent of restricting the use of or right of property in the game after it is taken or killed; and such statutes have been enacted in probably all jurisdictions."

Page 1008.

> "Statutes may be enacted regulating the time and manner of taking fish or game and making it an offense to violate these regulations, including fishing in the sea, although the National Government also has jurisdiction over such waters. The State may grant the exclusive right of hunting or fishing in certain places so far as it does not impair vested rights, or confer an exclusive right of fishing or hunting upon its

citizens to the exclusion of non-residents, and may impose greater restrictions and higher penalties on non-residents who violate its game laws than on residents. It may also exempt certain waters from the operation of its fish laws."

Page 1012.

"It is also within the police power of the State to regulate the method of taking fish or game within the State, and in many jurisdictions penal statutes to this effect have been enacted, as by making it an offense to catch or kill particular game by means of certain devices such as floating batteries, machine guns, spring traps, etc., or to catch fish in certain waters or at certain period by means of seines, nets, traps, dams or weirs, poisons or explosives, or by any device, except rod, hook and line; and by making it a misdemeanor for any person to have in his possession such nets, seines or other devices, and providing for the forfeiture or destruction of such nets or other devices when found in use in violation of the statute."

Geer v. Connecticut, 161 U. S. 529.

"In most of the States laws have been passed for the protection and preservation of game. We have been referred to no case where the power to so legislate has been questioned, although the books contain cases involving controversies as to the meaning of some of the statutes. * * * Wild game within a State belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it

is deemed necessary for the protection or preservation of the public good. * * * We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common."

See also:

Wharton v. Wise, 153 U. S. 155.
Dunham v. Lampere, 69 Mass. 268.
Commonwealth v. Manchester, 152 Mass. 230 and 139 U. S. 240.
Hartman v. Tressie, 36 Col. 146.
Lewis v. State, 148 Ind. 346.
State v. Craig, 80 Maine, 85.
Ex parte Fritz, 86 Miss. 210.
State v. Nergaard, 124 Wis. 414.
Burnham v. Webster, 5 Mass. 266.
State v. Haug, 95 Iowa, 413.
People v. Kirsch, 67 Mich. 539.
Com. v. Vincent, 108 Mass. 441.
Com. v. Essex, 79 Mass. 249.
Nickerson v. Brackett, 10 Mass. 212.

Therefore Kentucky has full power to regulate the taking of fish in its waters, unless that right has been taken expressly away.

19 Cyc. 1005 and note 3.

A. Kentucky has not been deprived of that right unless by the Compact with Virginia.

Kentucky has never entered into any contract, treaty, agreement or compact with the State of Indiana or any State bordering upon the Ohio River on the north, by which any of its fishing rights or general legislative rights have been abridged. It has never granted to the Federal Government any rights which would interfere with its fishing rights or general legislative rights, except in so far as they might conflict with rights ceded in the United States Constitution to the Federal Government; in short, this State has never in any way waived any of its sovereign powers; has never granted any away, with the exception of the instance cited *ubi supra,* and has therefore all rights, powers and authority to perform and do all things incident to sovereignty, with the limitations placed upon it by the Virginia Compact and the Constitution of the United States.

a. The Virginia Compact granted no fishing privileges.

Although the Virginia Compact did grant to Indiana and other States to be formed from its territory north of the Ohio River certain rights and privileges with reference to the Ohio River, it did not grant to them any fishing rights or privileges, that is, expressly. The word "fish" is not mentioned in the text of that instrument, and as Indiana was not the recipient of any privileges in that regard, we challenge her right to interfere with Kentucky in the protection, conservation or propagation of its fish or its regulation or prohibition of the taking of them.

19 Cyc. 1005 and note 3.

Wharton v. Wise, 153 U. S. 175.

"There is no ambiguity or obscurity in this language. It simply provides that necessary laws and regulations for the preservation of fish in the river Potomac, and for the performance of quarantine with respect to the river, and for preserving and keeping open the channel and navigation of that river, and of the river Pocomoke within the limits of Virginia, by preventing the throwing out of ballast or giving any other obstruction thereto, shall be enacted by the mutual consent and approbation of the two States. There is nothing in these provisions having any reference to fish of any kind in the Pocomoke River or in the Pocomoke Sound, whether that Sound be deemed a part of that river or otherwise. As observed by counsel, no clause of the compact having given any right to Maryland to fish in the Pocomoke River, there

was no reason why Maryland should be allowed to interfere in any way by legislation or regulation for the preservation of its fish."

b. The only clause which could be in any way construed as hampering Kentucky's rights, is the one conferring "concurrent jurisdiction."

It must be admitted that Indiana has concurrent jurisdicton on the river with Kentucky, but this admission is not made grudgingly and, as a matter of fact, we consider the whole question of concurrent jurisdiction as given Indiana by said compact, absolutely irrelevant and immaterial to the question in issue. This statement may seem absurd apparently, but when one considers the meaning of that grant of concurrent jurisdiction on the river, and the intention of it and the reasons for it, it is plain and beyond the shadow of question that it was not intended to, and does not, cover any such case as the one at bar, and contemplated an entirely different purpose and had reference only to the remedying or elimination of certain evils which must needs arise out of a situation circumstanced as the one by said compact created. In other words, that grant of jurisdiction was not for the purpose of dividing between the children States property, rights and privileges of the ancestor; it was not intended to mollify Indiana, Ohio and Illinois or make up to them their respective shares of Virginia's estate; the reason for it, the intention of it, the sole purpose of it undoubtedly was

to prevent the Ohio River from becoming a free and ungoverned strip of territory, a wild and lawless area, supervised and ruled by no power, a hotbed for crime, iniquity and vice, free and untrammelled by the authority of law and order. That was the intention in the minds of those framers of the instrument ceding territory out of which was created great Commonwealths.

It is almost beyond doubt, in our minds, that the intention and purpose, the sole reason, for the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed one foot south or two feet north of the exact boundary. This was the unwholesome state which the grant was designed to eliminate; this was the reason why Indiana was given concurrent jurisdiction on the river, so she, too, could *regulate and govern the acts of men occurring on the Ohio River;* but never in the contemplation of any one was the right or duty given or imposed on the States north of the Ohio River to do anything except to regulate and govern *acts on the river.* This construction has been also placed upon the clause by You in the case of Wedding v. Meyler, 192 U. S. 583, to-wit:

> "The question that remains, then, is the construction of the Virginia compact. It was suggested by one of the judges below that the words 'the respective jurisdictions * * * shall be concurrent only with the States which may possess the opposite shore' did not import a future

grant, but only a restriction; that they excluded the United States or other States, but left the jurisdiction of the States on the two sides to be determined by boundary, and therefore that the jurisdiction of Kentucky was exclusive up to its boundary line of low-water mark on the Indiana side. This interpretation seems to be without sufficient warrant to require discussion. A different one has been assumed hitherto, and is required by an accurate reading. The several jurisdictions of the two States, respectively, over adjoining portions of a river separated by a boundary line is no more concurrent than is a similar jurisdiction over adjoining counties or strips of land. Concurrent jurisdiction, properly so-called, on rivers is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase.

"The construction adopted by the majority of the Court of Appeals seems to us at least equally untenable. It was held that the words 'meant only that the States should have legislative jurisdiction.' But jurisdiction, whatever else or more it may mean, is jurisdiction in its popular sense of authority to apply the law to the acts of men. What the Virginia compact most certainly conferred on the States north of the Ohio was the right to administer the law below low-water mark on the river, and, as a part of that right, the right to serve process there with effect. What more jurisdiction, as used in the statute, may embrace, or what law or laws properly would determine the civil or criminal effect of acts done upon the river we have no occasion to decide in this case. But so far as applicable we adopt the statement of Chief Justice Robertson in Arnold v. Shields, 5 Dana, 18, 22; 'Jurisdiction, unqualified, being, as it is, the sov-

ereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judiciary and executive, as that possessed by Kentucky, over so much of the Ohio River as flows between them.'

"The conveniences and inconveniences of concurrent jurisdiction both are obvious and do not need to be stated. We have nothing to do with them when the law-making power has spoken. To avoid misunderstanding, it may be well to add that the concurrent jurisdiction given is jurisdiction '*on*' the river, and does not extend to permanent structures attached to the river bed and within the boundary of one or the other State. Therefore, such cases as Mississippi & Missouri Railroad v. Ward, 2 Black, 485, do not apply. State v. Mullen, 35 Iowa, 199, 206, 207."

It is evident to our minds that the decision reached by You in the Wedding case was based on the theory advanced above; namely, that the primary, principal and sole purpose in granting concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the water. That is why it was said that the jurisdiction given was intended to cover acts 'on' the river; it is to be emphasized that a distinction is drawn between *on* the river and below the surface thereof, and the court deemed it so important that a separate paragraph was added to the opinion and stated that in order not to be misunderstood, it expressly stated that the jurisdiction was not to extend

to the bed of the river or other property belonging to Kentucky. Having seen what the 'concurrent jurisdiction' given to Indiana has been said to mean, we must now consider—

c. What are the Legislative Rights of States Having Concurrent Jurisdiction?

As to arriving at the answer to this question, we think the less circuitous route is via court decisions, and we therefore proceed to cite you to the following:

Wharton v. Wise, 153 U. S. 175.

"As observed by counsel, no clause of the compact having given any right to Maryland to fish in Pocomoke River, there was no reason why Maryland should be allowed to interfere in any way by legislation or regulation for the preservation of its fish."

State v. Bowen, 135 N. W. 495.

"In Roberts v. Fullerton, 117 Wis. 222, it was held that the jurisdiction of a State for the enforcement of its fish and game laws is co-extensive with and limited by the boundaries of the State, *even though they consist of the thread of a navigable stream over whose waters the adjacent States have concurrent jurisdiction for other purposes.*"

State v. Moyers, 136 N. W. 898.

"The whole question seems to turn ultimately upon the meaning to be given to the phrase 'concurrent jurisdiction.' If the purpose of Congress was to give to each of the States border-

ing on the river no other power than to enforce its laws with reference to transactions on that part of the river included within its boundary line, then no purpose whatever was served beyond that which would have been accomplished by fixing the boundary line itself, for complete jurisdiction up to that boundary line would thereby have been vested in the adjoining States. Certainly something more was intended, and the thing evidently intended was that all the jurisdiction which might otherwise have been exercised by the State with reference to transactions on the river within the boundary line should be possessed and exercised by the State with reference to like transactions on any part of the river without regard to the boundary. This conclusion is in accordance with the great preponderance of authority in relation to similar questions. Keator Lumber Co. v. St. Croix Boom Corp., 72 Wis. 62; Opsahl v. Judd, 30 Minn. 126; Carlisle v. State, 32 Ind. 55; McFall v. Commonwealth, 2 Metcalfe (Ky.), 394. The use of the term is not to be construed as requiring joint action of the two States. Manifestly this is so, for joint action in the exercise of jurisdiction over the river would be impracticable. Neither the legislatures nor the courts of the two States could make a joint arrangement by which the laws of the one should not be operative on the river, unless they coincided in every way with the laws of the other."

Roberts v. Fullerton, 117 Wis. 235.

"Without proceeding further in our investigations we are satisfied that the term 'concurrent jurisdiction' was used in the acts admitting or providing for the admission of Wisconsin and Minnesota into the Union in the same sense in

which it had theretofore been used as applicable to similar situations, both in written and unwritten laws—in the same sense that it is said concurrent jurisdiction exists by comity of nations upon waters divided by their boundary line unless otherwise provided by some written law.

"Tested by the principle above adopted, do the mere police regulations of one country regarding the exercise of the common right of fishing extend into the territory of a foreign jurisdiction, the two being separated by an imperceptible boundary line in a river or lake? Is the common right of fishing which belongs to the people of this State within all that part of its territory on the easterly side of the main channel of the Mississippi River subject to the laws of the State of Minnesota? There is no escaping the conclusion that if such is the case it is competent for that State to extend its police regulations as regards fishing and hunting over a large part of the waters of Lake Superior on the Wisconsin side, reaching up to the shore line, and for the State of Michigan to extend its laws on Lake Michigan on the same subject to the Wisconsin shore. We have searched in vain to find authority to sustain the affirmative of the proposition suggested. In no instance recorded in the books has one country been held entitled to exercise jurisdiction to regulate the common right of fishing in the territory of a foreign State under the measure of concurrent jurisdiction commonly exercised by the two on the waters divided by their boundary line. We venture to say that such concurrent jurisdiction has never been successfully invoked to justify interference by one State or country with the enjoyment of the right to fish within the territorial boundaries of the other. It would be foreign to the necessities of this case to enter into a discussion regarding the

limits of that jurisdiction. It is sufficient for this case that we have reached the conclusion that, while it refers to acts of a criminal or civil nature on the water, or acts in some way connected with the use of the water for navigable purposes, it does not extend to the right of one State by legislative enactment to govern the fishery rights of the people in a foreign jurisdiction. As we have before seen, this country and the British provinces exercise concurrent jurisdiction over the waters divided by their boundary line, and the same is true as to this country and Mexico. No one would venture to say that one country could enforce its laws for the preservation of fish or regulating the taking of fish within the territorial limits of the other. It is to be regretted that the nature of the authority on waters of the Mississippi exercisable by Wisconsin and Minnesota has not been heretofore definitely decided. No court has yet dealt with the subject or the meaning of the language requiring construction in similar situations, so as to cover the whole thereof satisfactorily, if at all. Many judges have deplored the uncertainty existing, but have found a convenient way of escaping the labor of removing it. The interests at stake are so great that it is not to be wondered that any one appreciating the same should hesitate long before entering upon the difficult task of solving completely the troublesome question suggested. There is a concensus of opinion that concurrent jurisdiction does not mean concurrent dominion, and that it refers only to things afloat or on the water in some reasonable view of the situation, or so circumstanced as to be legitimately regarded as connected with the use of the water for navigable purposes. That is about as far as the courts have gone. In Garner's case, 3 Grat. (Vir.) 655

and 676—a case decided in a jurisdiction where, if anywhere, we would expect the term under discussion to have had a well-defined and well-understood meaning at an early day—while the judges in lengthy opinions severally referred to it, not one of them attempted to define it. Judge Talliaferro said, it refers 'only to things afloat' at best. 'The question is a very important one and I decline stating an opinion, when it does not necessarily arise in the case.' Justice Fry said (page 752) 'What is the precise meaning of "concurrent jurisdiction" I am not prepared to say. It strikes me as equivalent to "common."' It is our opinion that the term refers to that authority commonly exercised concurrently upon water divided by the boundary line between two countries, according to the public law as recognized in this country at the time the use of the term became common in our legislative history; that it relates to matters at least in some way connected with the use of the water for navigable purposes, to things afloat, or in some legitimate sense on the water—things difficult to deal with if it were necessary to determine in each instance of the exercise of jurisdiction the precise location of the particular act involved as regards the boundary line; that it does not include the right to regulate the enjoyment, by the people of one State within its domain, of rights incident to their situation, such as the right to navigate or fish. It does not empower one State to spread its mere police regulations over territory of another, regulating the sovereign property right of the latter in or to the water flowing over such territory, or to the fish therein or fowls thereon, which it holds in trust for the enjoyment of the whole people within its boundaries, in their individual capacities, under such legal restraints as such other, in its legislative wisdom, may see

fit to impose,—so long as such enjoyment does not interfere, unlawfully, with like enjoyment by the people of the State on the opposite side of the boundary."

Keator Lumber Co. v. St. Croix Boom Corp., 72 Wis. 95.

"Are the words 'concurrent jurisdiction' as thus used, to be construed as requiring the joint action of both States to give validity to such a charter, or could Minnesota do so alone, with the corresponding right in Wisconsin to grant a similar charter? If such joint action was necessary to give such validity then the refusal or mere failure of one State to so act would wholly prevent the exercise of any jurisdiction by either State. 'Concurrent jurisdiction' are words usually applied to two or more courts. When so applied, no one has ever pretended that the exercise of such jurisdiction by the one court was dependent upon its concurrent exercise by any other court. On the contrary all recognize the authority of each such tribunal to deal with the same subject matter, at the choice of the suitor. This is illustrated by the jurisdiction of State and Federal courts, in the same territory, as to controversies between citizens of different States and also as to other matters. They never concur in each other's actions, but each proceeds separately and independently of the other. The same is true respecting offenses and torts committed upon a river dividing two States, where the courts of each have jurisdiction of the same; for, in such case, each court must necessarily act separately and independently of the other. Such jurisdiction of the courts of the respective States, when concurrent, extend to the whole of that portion of the river dividing them. State v. Plants, 25 W. Va. 119; Carlisle v. State, 32

Ind. 55. Although the words 'concurrent jurisdiction' and 'jurisdiction' are usually applied to the rightful authority of courts, yet they are not limited to such use. On the contrary, they are broad enough to embrace also the exercise of both legislative and executive power, Kendall v. U. S. 12 Pet. 623; Sherlock v. Alling, 44 Ind. 184. Thus it is said in the case last cited 'that this State (Indiana) possesses concurrent jurisdiction with the State of Kentucky on the river at the place where the cause of action, if any, arose. The jurisdiction may be exercised in such manner as the State shall elect. It was exercised in unmistakable language in the constitution, by declaring that the State possesses such concurrent jurisdiction, in civil and criminal cases, with the State of Kentucky. The jurisdiction which the State possesses is not limited to the service of process. It is general, and includes the right of legislation touching all civil and criminal cases on the river, * * * The jurisdiction asserted by the constitution is not limited to judicial proceedings in civil and criminal cases. It is such as the State may choose to exercise touching such actions, and legislation is included.' The three co-ordinate branches of the State government must, necessarily, in their respective spheres, possess powers which are co-extensive with each other.

"The words 'concurrent jurisdiction' must have been used in the compact between the Federal government, Wisconsin and Minnesota, in the sense in which they had previously been used and were generally understood. When, therefore, by such compact, it was in effect provided that each such State shall have 'concurrent jurisdiction' on that portion of the River St. Croix constituting the boundary line between them, it included the exercise of such legislative pow-

ers by each State over the whole river as were consistent with the exercise of similar powers over the same portions of the river by the other State. In other words, by such compact, each State secured to itself such 'concurrent jurisdiction' upon the half of the river within the territorial limits of the other State, by reducing what would otherwise have been its exclusive jurisdiction upon its own half to mere 'concurrent jurisdiction.' The result is that neither of these States could, *as against the other,* rightfully assume, or authorize the assumption of, permanent and exclusive occupancy, possession and control of the entire navigable portions of the river. Of course, no two structures or bodies can occupy precisely the same space at the same time upon a river, any more than elsewhere. Nevertheless, either State may, in aid of navigation, assume or authorize the assumption of, reasonable occupancy, possession and control of portions of such navigable waters, provided the same is reasonable consistent with similar occupancy, possession and control which may be assumed or authorized by such other State. Concurrent jurisdiction, to be of value to the respective States or to anyone, must have a practical application. Such application should, moreover, be consistent with the reasonable continuance of a navigable channel as a public highway between such States, and must necessarily remain subject to any regulation of commerce by congress under the commercial clause of the Federal constitution."

State v. Nielson, 95 Pac. 721.

"The right to exercise concurrent jurisdiction over rivers forming State boundaries will be found discussed by Mr. Rorer in his work on

Interstate Law, 336 *et seq,* and in notes to Roberts v. Fullerton, 117 Wis. 222. And, as we have already remarked, in no instance has the suggestion been made that the validity of the law sought to be enforced was dependent upon the acquiescence or concurrence of the adjoining State unless it was concerning some important fact or annexed to the soil. But on the contrary, in Keator Lumber Co. v. St. Croix Boom Corp., 72 Wis. 62, it is expressly declared that concurrent jurisdiction is not joint in the sense that only legislative acts adopted by both States can be effective on boundary waters."

Nielson v. Oregon, 212 U. S. 320.

"Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting channel. Where an act is *malum in se* prohibited and punishable by the laws of both States, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of the one State can not be prosecuted for the same offense in the courts of the other. But, as appears from the quotation we have just made, it is not limited to this. It extends to civil as well as criminal matters, and is broadly a grant of jurisdiction to each of the States.

"The present case is not one of the prosecution for an offense *malum in se,* but for one simply *malum prohibitum.* Doubtless the same rule would apply if the act was prohibited by

each State separately, but where as here the act is prohibited by one State and in terms authorized by the other, can the one State which prohibits, prosecute and punish for the act done within the territorial limits of the other? Obviously, the grant of concurrent jurisdiction may bring up from time to time many and some curious and difficult questions, so we properly confine ourselves to the precise question presented. The plaintiff in error was within the limits of the State of Washington, doing an act which that State in terms authorized and gave him a license to do. Can the State of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that State had specially authorized him to do? We are of opinion that it can not. It is not at all impossible that in some instances the interests of the two States may be different. Certainly, as appears in the present case, the opinion of the legislatures of the two States is different, and the one State can not enforce its opinion against that of the other, at least as to an act done within the limits of that other State. Whether, if the act of the plaintiff in error had been done within the territorial limits of the State of Oregon, it would make any difference we need not determine, nor whether, in the absence of any legislation by the State of Washington authorizing the act, Oregon could enforce its statute against the act done anywhere upon the waters of the Columbia. Neither is it necessary to consider whether the prosecution should be in the names of the two States jointly. It is enough to decide, as we do, that for an act done within the territorial limits of the State of Washington under authority and license from that State one can

not be prosecuted and punished by the State of Oregon."

See also State v. Mullen, 35 Iowa, 199.
Fritz v. State, 155 S. W. 384.
Sanders v. St. Louis, 97 Mo. 26.
Little v. Green, 123 N. W. 367.

Without dwelling too lengthily on the discussion of the foregoing authorities, we suggest that there is not one which is in conflict with the position taken by defendant in error. It is and must be practically admitted, that the limitation upon Kentucky's exclusive ownership, control and jurisdiction on the Ohio River, if there be any, must be measured by the construction of the words "concurrent jurisdiction" as used in the Virginia Compact. There have been many cases, some of which have been just cited to Your Honors, and several which this court itself has handed down, in which the words "concurrent jurisdiction" have been defined generally, or defined in connection with particular facts. All of these cases, however, have arisen where the middle thread of the stream constituted the boundary between States, thus leaving to each State the ownership of a portion of the bed of the stream. The peculiar character of the Ohio River lying, as it does, entirely within the boundaries of the State of Kentucky, clearly differentiates it from other dividing waters, such as the Columbia, Mississippi, Missouri and Hudson rivers, whose middle threads divided the territories of the respective States occupying their opposite shores.

It should not be forgotten that "concurrent jurisdiction" does not include the sovereignty or ownership of the river. That jurisdiction is conferred *not for the purpose of destroying* the title of either sovereign, *but to render more efficient* the policing of the stream, and to prevent the loss and confusion which would result from defeating actions by pleas to the jurisdiction, where it might be difficult to determine precisely where the act occurred. It would be a harsh rule that would give each State the power to exclusively establish its own laws over the entire water regardless of its territorial limit. Which brings us down to a minute consideration of the utterances of this Honorable Court in the Nielson v. Oregon case, cited *ubi supra.*

You have seen fit to employ in that case the following language:

> "Can the State of Oregon, by virtue of its concurrent jurisdiction disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that State had specially authorized him to do? We are of the opinion that it can not."

It is further therein stated that if the act had been committed within the boundaries of the State prohibiting the act, the decision may have been different, but no decision is expressly given upon the point. However, the intimation that the decision would have been different is so strong therein, that it is almost a foregone conclusion. It must neces-

sarily have been different, if we are to follow out the logic and line of reasoning upon which that decision is based. Let us suppose that the act therein, had been committed within the territorial boundaries of the State which prohibited it, and take the above quotation from the opinion and substitute the names of the States to fit our supposititious case. Would it not be thus:

> "Can the State of Washington, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Oregon, and prevent Oregon from punishing a man for doing within the territorial jurisdiction of Oregon an act which that State had specially prohibited him from doing?"

It was announced in the Nielson case, that the decision was reached by this line of reasoning: That where two States owned to the middle of a boundary stream, and both had concurrent jurisdiction on the river, one State would not be permitted to interfere with the enforcement of the law of the other State within that other State's territorial limit. Now if the States on the northern side of the Ohio River are to be allowed to interfere with Kentucky's enforcement of her own law within her own territorial limits, this case will have to be differentiated in some manner from the decision in the Nielson case. Whereas, the only differences between the two cases are: 1. Kentucky owns the entire river; and 2. Indiana has not up to this time passed a law licensing seining in

the river. Both of which differences militate strongly in favor of the decision for which defendant in error contends.

Further, the Supreme Court of Wisconsin has said in the Fullerton case:

> *"In no instance recorded in the books has one country been held entitled to exercise jurisdiction to regulate the common right of fishing in the territory of a foreign State under the measure of concurrent jurisdiction commonly exercised by the two on the waters divided by their boundary line. We venture to say that such concurrent jurisdiction has never been invoked successfully to justify interference by one State or country with the enjoyment of the right to fish within the territorial boundaries of the other."*

We realize, of course, that this court is not obligated to guide its decisions by utterances of state courts, and yet we presume that this court does not object to glance at the findings of other courts, although inferior to You, yet painstaking and worthy of consideration.

But returning for the moment to the Nielson case, and taking the short quotation therefrom as a formula, let us again substitute therein the names of States and apply same to the case at bar:

> "Can the State of Indiana, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Kentucky, and prevent Kentucky from punishing a man for doing within the territorial jurisdiction of Kentucky, an act which that State had specifically prohibited him from doing?"

We respectfully urge that this question must be negatived, by the acceptance of defendant in error's theory of this case.

d. The only cases supporting the contention that "Concurrent Jurisdiction" means "Joint."

Plaintiff in error's contention that under the concurrent jurisdiction clause, there must be consents by the States bordering upon the northern and northwestern shores of the Ohio River, to our statute before it has the force of a law, is supported by two decisions and only two. They are *In re* Mattson, 69 Fed. 535, and *Ex parte* Desjeiro, 152 Fed. 1004, both decided by the same court, the District Court for some district in Oregon. They hold that a joint statute is necessary and they are the only two decisions in the Federal or State courts, that we have been able to find, that hold that way. Both of these cases were considered by you in the Nielson case and were practically disregarded. They were expressly disapproved in that case in the Supreme Court of Oregon and although this court did reverse that decision, that part of the decision was not reversed. This court refused to affix its stamp of approval upon the law as laid down by the District Court decisions, because although You declined to allow Oregon to punish Nielson for doing an act in Washington which Washington licensed him to do, yet You did not hold Oregon's law unconstitutional and really intimated that had the act been committed within the

territorial jurisdiction of Oregon, Nielson could have been punished. The purport of the decision must needs be that, otherwise Washington would be allowed to do in Oregon, exactly what it was held Oregon could not do in Washington. We therefore cite the two decisions of said District Court, but suggest that they are not good law. In addition to all of which, however, we submit, that even if the decision in the Nielson case would have been the same, if the act had been committed in Oregon, yet the law in that case is not conclusive in the decision of the case at bar, as the concurrent jurisdiction which was given to Washington and Oregon, is not the same as the jurisdiction that Kentucky has on the Ohio River, by reason of the difference of circumstances surrounding the granting of it, as well as the fact that while Washington and Oregon each own to the middle of the stream, the whole of the Ohio River lies within the territorial limits of the State of Kentucky. The point we mean to emphasize is, that had the concurrent jurisdiction been given the States on the north side by Kentucky instead of Virginia, it would doubtless be apparent that she wished not to surrender or limit her sovereignty over the Ohio River, but merely to allow them to have that concurrent jurisdiction which would prevent the escaping of persons having violated laws upon the river, from escaping their just punishments, by reason of nice questions arising as to whether the act was committed on one side or the other of the boundary line, which

the prosecution might not be able precisely to show. And granting this, we deem it a very small step towards admitting that no difference could be shown, so far as the positions of Indiana, Ohio Illinois, Missouri and West Virginia are concerned, whether they got their grant from Virginia when she owned the territory, or from Kentucky, after she became the owner of it. To quote again from the expression of this court in Smith v. Maryland, 18 How. 71:

> "The State holds the propriety of this soil for the conservation of the public rights of fishery thereon and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery * * *. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held."

It can not with any degree of plausibility be said that Virginia by its Compact intended—or that Kentucky accepted such intention—to release her indisputable right to control her own river flowing over her own soil; her ownership of the river, her proprietorship of the fish in trust for her people, carried obligations. We feel that a State should not be lightly held to have surrendered or limited her sovereignty.

Again, let us consider what would be the result if plaintiff in error's theory is held to be correct. If Indiana must concur, then Ohio and Illinois must concur. Say, for the sake of argument, that Indiana

did consent but that Illinois and Ohio would not. Then, under plaintiff's contention the law would be good as to the parts of the river opposite Indiana, but not as to those portions opposite the shores of Ohio and Illinois; would be good in part of Kentucky but not in other parts; in some counties arrests for seining in the Ohio River could be made, while in other counties, the ones opposite Illinois and Ohio, persons could seine to their heart's content, and with impunity.

Again, under such conditions, the very purpose, reason and intention for granting the concurrent jurisdiction would be defeated. Suppose a man arrested for seining in the Ohio River near the line between Ohio and Indiana; if he was in that part of the river opposite Indiana, the law would be good and he is convicted; if he was in that part of the river opposite Ohio, the law would not be good, because Ohio had not concurred in it, and he would have to be released. And thereby, we say the very object of the grant would necessarily be defeated. If the grant were made for the purpose of eliminating the necessity for the State to prove whether the crime sought to be prosecuted was committed "one foot south or two feet north" of the boundary line, then the evil which the grant was designed to do away with, crops forth again in all its former malignity, and therefore we contend that under such a ruling, the purpose, reason and intention is defeated, and therefore we contend that such a ruling must necessarily be er-

roneous, and further we urge that practically all of the authorities so hold.

5.

If it were necessary for Indiana to concur, all Kentucky River laws are void and without force.

Kentucky has now on its statute books the following laws:

Quarantine on the river—Sections 2049 & 2056,
Persons dying on boat—Section 1334,
Liens on Water craft—Section 2480,
Owner and boat liable for damages, 2481,
Corporations improving navigation, 1599 a,
Right to construct bridges, 3720 a,
Ferries, County Court may grant, 1800,
Crimes on river, 1144 and Crim. Code 20,
Evading Inspection on river, 1204,

Regulations for sale of liquor and other laws and regulations.

If plaintiff's contention is sound, that Indiana must concur, all these and similar laws would be void and of no effect, because Indiana has not concurred in them. This certainly would result in lawlessness and chaos and would entirely defeat the intention of the grant; and as Kentucky has not concurred in Indiana's laws, they too would be unconstitutional and of no force, and there would be no law on the river, which situation, we take it, our courts are not going to thrust upon us, and which defeats the very object and intention of the compact.

But it is clear the courts of Kentucky have not adopted this policy, because they have in innumerable instances sustained convictions for violations of these laws; they have upheld these acts of the Legislature although none of them was every concurred in by Indiana.

a. What Kentucky has held.

In Church v. Chambers, 3 Dana, 279, the Court of Appeals said:

> "A State having a concurrent jurisdiction of the Ohio River, may certainly pass laws for preventing crimes and torts upon it without denying, in the least degree, to every citizen of the United States equal right to the use and navigation of it, according to the full spirit and policy of the guarantee in the compact. And therefore, Kentucky had a right to declare, that the abduction of slaves or the deportation or transportation of them, in vessels on the Ohio River, within her jurisdiction, without the consent of the owners, and to their damage, should be unlawful."

In McFarland v. McKnight, 6 Ben Mon. 510, the court of Appeals said:

> "The act of Kentucky in question (Kentucky law prohibiting removal of slaves), is cautiously framed, so as to designate that part of the Ohio River which is within the limits and rightful jurisdiction of this State, and no more. * * * The laws of every State, Nation and Empire have force within its limits. Neither the citizens of other States of this Union, nor the citizens or

subjects of foreign States or Potentates have the right whilst within the limits of Kentucky, to disrespect her laws, to commit wrongs, trespasses or damage upon persons or property within her limits. All persons and property within the limit of this State, during the stay, whether temporary or permanent, are under the protection of her laws. * * *"

In both the foregoing cases, Kentucky courts upheld Kentucky laws governing acts on the river, although the laws had not been concurred in by Indiana. In numerous other cases, we find the same State of things existing and in no case do we find a court holding that a Kentucky law governing the river is unconstitutional or ineffective because it has not been concurred in by the States on the north side of the Ohio River.

See also on this point:

McFall v. Com., 2 Metc. 394.
Lemore v. Com., 127 Ky. 480.
Strater v. Fore, 2 B. Mon. 124.

It might be well to call the court's attention to the fact that on some of these subjects, if not all of them, Indiana had undertaken to legislate, so that the point can not be made that one state's right to pass laws might exist until the other had acted, but not afterwards; in these cases and many others convictions for violations of Kentucky laws in which Indiana had not concurred, were upheld, even though Indiana had legislated on the subject; and further, Indiana laws have been upheld in Indiana although Kentucky

had never concurred in them, as will be shown later.

To return, however, to our original contention, if plaintiff's contention is sound, then all Kentucky river laws are void.

6.

There Is No Conflict Here With Indiana Law.

At the oral argument counsel for plaintiff contended that Indiana had passed laws which were in conflict with the law here sought to be voided, and cited, or rather quoted, said law in the petition. We read the law differently and receive a different impression. It impresses us in just the opposite manner; instead of being in conflict it is exactly in accord, as far as it goes. The Indiana statute is one for the purpose of protecting and conserving the fish of that State. It prohibits the taking of them by means of a seine and then says that the statute shall not apply to the Ohio River, except that no person shall place a seine or net within a certain distance of the mouth of any stream emptying into the Ohio River from the Indiana side.

Unquestionably there is a distinction between failing to prohibit an act, and actually *in terms* permitting it and licensing it. Indiana does not license seining in the Ohio, it just fails to prohibit it. It says that its statute shall not apply to the Ohio River, except as to certain distances from the mouths of Indiana streams. Whether Indiana failed to pro-

hibit seining in the Ohio River because it believed it did not have the authority or whether it believed it had the authority but refrained because it didn't care to, of course, is unknown; but if Indiana has *not* the authority, then certainly it can not interfere with Kentucky's doing so; while if Indiana has the authority, then certainly Kentucky, who virtually gave her what authority on the river she has, has it at least as much.

a. What Indiana has said on the subject.

The question of the right of Indiana to pass a law governing the river without Kentucky's consent, has been raised in Indiana, and the courts of that State have consistently held that Indiana has the right to pass laws without said concurrence.

In Sherlock v. Alling, 44 Ind. 197, the Supreme Court of Indiana said:

> "But it is claimed further, that the two States can not exercise concurrent legislative jurisdiction over the same territory, on account of practical difficulties; that the laws enacted by them on the same subject may be, and in this instance are, different and inconsistent. We admit that the difficulties do, or rather may, exist. The fact that they do does not, and can not, defeat such jurisdiction however. That exists. Each State is created subject to it. It is not exclusive in either. So far as the acts of the two States on this subject differ, we do not think there can be any real difficulty. If actions are prosecuted in both States a judgment in one will be a bar

to the other. There can be but one judgment and satisfaction for the same debt. Even if judgment shall be rendered in each case, still the satisfaction of one will be a satisfaction of the other. If the jurisdiction is not concurrent in both States it does not exist in either, and the Ohio River is exempt from all legislative control, except such as may be exercised by Congress. There is no grant of exclusive jurisdiction to either. On the contrary, the provision is that it shall be concurrent. The fact that the river is within the boundaries of Kentucky does not relieve us of the difficulty or give that State exclusive jurisdiction in the face of the provision that it shall be only concurrent with Indiana. We are of the opinion that the law applies to cases where death is caused by wrongful acts or omission on vessels whilst navigating the Ohio River under license under the acts of Congress, by the owners or their agents, officers and servants in charge of said vessels; that it is not invalid as tending to regulate commerce among the States, or as hindering or obstructing the free use of that license under which such owners may be navigating the river."

This case has been followed in other Indiana decisions to such an extent that it must be taken as the policy of the Indiana courts on the subject.

7.

SPECIAL DEMURRER.

Has Plaintiff in Error Right To Raise The Question?

The only point raised by the special demurrer is the one just above stated.

It has been shown that Indiana is not complaining of this act and shown further that the Indiana statute is not in conflict with it, and therefore we have suggested that it does not lie well in the mouth of one of our citizens to ask our courts to say that Kentucky has not the right to pass laws without Indiana's consent, although Kentucky has always consistently held the other way, and although Indiana, herself, has held that both Kentucky and Indiana can pass laws governing the river, independently of each other.

Further the State of Indiana is not a party to this action and this proceeding here could not be effective or binding against her or her rights.

The authority for our position is as follows:

In Keator Lumber Co. v. St. Croix Boom Corp., 72 Wis. 97, it was held:

> "Here large portions of the defendant's booms were upon this side of the river, and between the main channel and the Wisconsin shore. It may be, as contended, that the defendant's charter grants or purports to grant authority, or, at least, that the defendant under it, has assumed to exercise authority, which transcends the rightful powers of Minnesota, and infringes

the concurrent jurisdiction of Wisconsin. Assuming such to be the case, the question recurs whether such excess of rightful jurisdiction is available to the plaintiffs. In Rundle v. D. & R. Canal Co., 14 Howard, 80, it was held that the plaintiffs, being but tenants at sufferance in the usufruct of the water of the two States, who owned the river as tenants in common, were not in a condition to question the relative rights of either state to use its waters without the consent of the other; that as, by the laws of their own State, the plaintiffs could have had no remedy against a corporation authorized to take the whole waters of the river for the purpose of canals, or improving the navigation, so they could not sustain a suit against a corporation created by New Jersey for the same purpose, which had taken a part of the waters. The principle of that decision seems to be that a mere private party should not be heard to complain that one of two States, divided by such river, had invaded the jurisdiction of the other, by diverting more than its share of the waters. So here, we think the plaintiffs are not entitled to be heard as to whether Minnesota has infringed the rightful jurisdiction of Wisconsin. This State is not a party to this suit, and her comparative rights in and upon the waters of the river at the points in question can not be adjudicated in this action."

Rundle v. D. & R. Canal Co., 14 Howard, 94.

"It follows necessarily, from these conclusions, that, whether the State of Pennsylvania claim the whole river, or acknowledge the State of New Jersey as tenant in common, and possessing equal rights with herself; and whether either State, without the consent of the other,

has or has not a right to divert the stream, it will not alter or enlarge the plaintiffs rights. Being a mere tenant at sufferance to both, as regards the usufruct of the water, he is not in a condition to question the relative rights of his superiors. If Pennsylvania chooses to acquiesce in this partition of the waters, for creating public improvements, or is estopped to complain by her own acts, the plaintiff can not complain or call upon this court to decide questions between the two States which neither of them sees fit to raise. By the law of his own State the plaintiff has no remedy against a corporation authorized to take the whole river for the purpose of canals or improving navigation; and his tenure rights are the same as regards both the States."

In conclusion, we can not refrain from again reiterating what a striking anomaly it is, that a citizen of our own State petitions our own courts to hold that our own laws are unconstitutional and invalid because the States on the north of us have failed to concur in them, when at the same time the courts of those States on the north have held and are continually holding that the laws of their States are constitutional and valid although Kentucky has not concurred in them.

Also in closing, we note that counsel for plaintiff in his able brief argues that as no cross-appeal was prayed from the ruling of the trial court overruling the special demurrer, that that question can not now be raised and is not involved on this appeal. However, we suggest in answer to this, that at the time the special demurrer was filed in the lower court, we were

in doubt as to whether the appellant's right to maintain the action could be raised by a general demurrer, and as a matter of precaution both general and special demurrers were filed. But since then we have concluded that the question of the plaintiff's right to maintain the action was properly raised by the general demurrer and should be considered under that. This question, *i. e.,* that the right of the plaintiff to maintain the action is properly raised by the general demurrer, is clearly decided by the Kentucky Court of Appeals in the case of the L. & N. R. R. Co. v. Brantley's Adm'r, 96 Ky. 297-301, *et seq,* in which that court clearly distinguishes between the want of legal capacity to sue and the right of the party to maintain the action.

We therefore respectfully urge that the judgment of the Kentucky Court of Appeals be affirmed.

Respectfully submitted,

Jos G. Sachs, Jr.,

Attorney for Defendant in Error and Kentucky Game & Fish Commission, Amicus Curiae.

D. A. Sachs, Jr.,

Of Counsel.